In the Supreme Court of the United States

OCTOBER TERM, 1926.

AUGUST CLIFF, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 222.

FREDERICK J. SCHICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 223.

WILLIAM BROADWELL, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 228.

LEO. W. MCCRAY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 301.

BRIEF FOR THE UNITED STATES.

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PRELIMINARY STATEMENT.

In each of these four cases there is raised the estion of the validity of sections 8 and 14 of the t of Congress of August 2, 1886 (24 Stat., 209) as ended May 9, 1902 (32 Stat., 193), imposing a x upon the manufacture and sale of oleomarga- ne.

The first three cases were criminal prosecutions by information instituted in the United States district court for the northern district of Illinois. In each case a jury was waived, a trial had before the court, the defendant found guilty, and a fine imposed. A motion to find the defendant, upon the evidence, not guilty, was filed in each case, the motion being overruled and exceptions taken. So too, motions for new trials and in arrest of judgment were filed, overruled, and exceptions taken.

In the McCray case suit was brought in the district court of the United States for the southern district of Ohio, to recover a penalty of $50, as provided in section 11 of the act of August 2, 1886, for having purchased and received for sale oleomargarine that had not been stamped as required by law.

THE CHARGES.

The substance of the charge in the *Cliff* case was:

That on December 22, 1902, at Chicago, Ill., Cliff, a retail dealer in oleomargarine, did knowingly purchase and receive for sale from the manufacturer 10 pounds of oleomargarine artificially colored with palm oil; that the said oleomargarine was contained in a new wooden original manufacturer's package, to which no coupon stamp or stamps in the sum of 10 cents for each pound of oleomargarine contained had been affixed for denoting the payment of the internal-revenue tax, as required by law, all of which Cliff, at the time he so purchased the same, well knew.

In the *Schick* case the charge was the same, except that the artificial coloration was the Wells-Richardson butter color.

In the *Broadwell* case the charge was the same as in the *Schick* case.

In the *McCray* case the petition avers that on October 24, 1902, McCray was a retail dealer in oleomargarine in Cincinnati, Ohio; that on that date he knowingly purchased of the Ohio Butterine Company, a corporation engaged in the manufacture of oleomargarine at Cincinnati, 20 pounds of oleomargarine which contained artificial coloring matter; that the stamps affixed to the package in which the oleomargarine was contained were of the value and at the rate of one-fourth of a cent for each pound contained in the package; all of which the defendant at the time well knew.

In his answer the defendant admits that at the time stated he was a retail dealer in oleomargarine; that he purchased the oleomargarine as alleged; that the revenue stamps upon the package were of the value of but one-fourth of a cent for each pound contained therein; that he had full knowledge respecting the ingredients used in its manufacture, the formula being given. He admits that the oleomargarine was of a yellow color; but he says that color was imparted to it by the use of the creamery butter, which had been colored yellow by the use of the "Wells-Richardson's Improved Butter Color," and that it contained no other coloring matter.

He denies that the oleomargarine was artificially colored within the meaning of section 8 of the act of August 2, 1886, as amended May 9, 1902.

In his second defense he alleges the act in question to be unconstitutional and void, which is the general defense in all the cases.

To this answer the Government interposed a demurrer, which, upon hearing, was sustained, and judgment was rendered against the defendant in the sum of $50 as penalty, and for costs. To this action the defendant duly excepted and sued out a writ of error to this court.

To summarize:

In the *Cliff* case the oleomargarine had been colored by the use of palm oil, and a tax of one-fourth cent per pound had been paid thereon;

In the *Shick* case the oleomargarine had been colored by the use of the "Wells-Richardson's Improved Butter Color," and a tax of 2 cents per pound had been paid thereon;

In the *Broadwell* case the oleomargarine had been colored by the use of the "Wells-Richardson's Improved Butter Color," and no tax whatever had been paid thereon; and

In the *McCray* case the oleomargarine had been colored by the use of creamery butter, which butter had been artificially colored by the use of the "Wells-Richardson's Improved Butter Color," and a tax of one-fourth cent per pound had been paid thereon.

ASSIGNMENT OF ERRORS.

As the errors assigned in the *Cliff* case embrace all those assigned in the other cases (with one exception), it will be sufficient to state the errors in that case, with the additional assignment in the McCray case.

In the *Cliff* case the errors alleged are:

I.

In refusing to hold that the provisions of the act of Congress relating to oleomargarine and butter of August 2, 1886, as amended by the act of Congress of May 9, 1902, under which the defendant was convicted, are in contravention of the Constitution of the United States and the amendments thereto, because—

(1) The said provisions deprive the defendant and the oleomargarine manufacturers and dealers in the United States of their liberty and property without due process of law.

(2) The said provisions constitute an unwarranted encroachment upon and interference with the police powers reserved to the several States and to the people of the United States.

(3) The said provisions invest an inferior executive officer with the power finally and arbitrarily to determine essentially judicial questions concerning vast property rights.

(4) The said provisions so arbitrarily discriminate against the oleomargarine industry in favor of the butter industry in the United States as to

be repugnant to the fundamental principles of equality and justice inherent in the Constitution of the United States.

II.

In striking out and refusing to consider proper evidence offered and received on behalf of defendant, showing—

(1) That the natural color of butter varies at different seasons of the year, from almost pure white in the winter season to a high shade of yellow in the spring season, if made from the milk of grass or clover fed cows; and that all butter during all seasons of the year, including that made from the milk of grass or clover fed cows, is uniformly colored a shade of yellow somewhat deeper than the natural color of June butter before it is put on the market.

(2) That there is no demand in the market for butter having only its natural color, except June butter, and that there is no demand in the market for oleomargarine for table use unless the same is colored a shade of yellow which causes it to look like yellow butter.

(3) That oleomargarine is a substitute for and competes with butter, and that the market demand for both butter and olemargarine requires that they shall have a uniform color of a shade of yellow during all seasons of the year.

(4) That the cost of production of oleomargarine is such that after payment of a tax of 10 cents

per pound thereon when colored, as required by the act of Congress relating to butter and oleomargarine of August 2, 1886, as amended by the act of Congress of May 9, 1902, the same can not be sold in competition with butter.

(5) That the operation and effect of said act of Congress as amended, relating to butter and oleomargarine, are to prevent the people of the United States from obtaining oleomargarine in the condition in which they want it, and to destroy the oleomargarine industry in the United States, and unjustly to discriminate against the same in favor of the butter industry. (R., p. 26.)

The additional assignment of error in the *McCray* case is the following (R., p. 8):

(III) If said act be not in contravention of the Constitution of the United States of America, then said court erred in holding that oleomargarine which contains no other artificial coloration than that imparted to it by the use of butter which itself contains coloring matter and which therefore causes said oleomargarine to look like butter of a shade of yellow, is subject to a tax of 10 cents per pound instead of a tax of one-fourth of 1 cent per pound.

ARGUMENT.

There is involved in these cases the validity of sections 8 and 14 of the oleomargarine law. The pertinent portions of these sections are as follows:

> SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed

for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a packet shall be taxed as a pound: *Provided*, When oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow said tax shall be one-fourth of one cent per pound. (Act of May 9, 1902; 32 Stat., 194.)

SEC. 14. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

The law is given in full as Appendix "A" to this brief.

The plaintiffs in error contend that these provisions violate the Constitution and the amendments thereto, in that—

(1) They encroach upon and interfere with the powers reserved to the several States;

(2) They deprive the plaintiffs in error of liberty and property without due process of law;

(3) They invest an administrative officer with the power finally to determine essentially judicial questions.

I.

THE PROVISIONS ATTACKED DO NOT ENCROACH UPON OR INTERFERE WITH THE POWERS RESERVED TO THE SEVERAL STATES.

In entering upon a discussion of this question it becomes necessary at the outset to ascertain the character of the tax imposed and of the law in question. That the tax is an excise can not be doubted (*Patton* v. *Brady*, 184 U. S., 619); and that the act is to be deemed a revenue measure has been declared by this court (*In re Kollock*, 165 U. S., 536). In the latter case the validity of those provisions of section 14 of the act under consideration which empower the Commissioner of Internal Revenue to designate the character of the brands which shall be placed upon oleomargarine before its sale, was assailed as being an attempted delegation to that officer of judicial power. In reaching the conclusion that those provisions were not open to objection, the court discusses the character of the act, the Chief Justice, speaking for the court, saying (p. 536):

> The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

After referring to the authority conferred upon the Secretary and the Commissioner of Internal Revenue by section 3446 of the Revised Statutes, to

change the character of the mark or label used on tobacco or distilled spirits, and to make and publish regulations respecting their use, the court continues (p. 537):

> The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection to purchasers in respect of getting the real and not a spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding must be regarded as means to effectuate the objects of the act in respect of revenue.

The amendment to section 8 made by the act of May 9, 1902, does not change the character of the law. It must still be regarded as a revenue measure.

The tax being an excise and the act a revenue measure, in what way does the imposition of this tax interfere with or encroach upon the *power* of the *States* to regulate the manufacture of oleomargarine? The opposing argument amounts to this: That by the imposition of the tax the Government diminishes profits, compels the product to be branded so as to render it more difficult to sell it as a substitute for butter, and by so doing diminishes the demand and output. That therefore by diminishing the demand for the article in the

colored form the Federal authority illegally regulates and restricts its production, which is wholly a matter for State control.

But this is clearly a mistaken conception of the situation. This tax is a *burden* imposed by Congress. The result of any tax is necessarily more or less onerous. It is not regulation within the constitutional meaning of the term as obnoxious now to National and again to State authority. Congress does not go outside of its domain to "regulate," and regulates (so to speak) or controls the business only so far as is legitimate to discover the selected objects of taxation and to assess and collect the tax thereon. Congress lays down certain rules, mainly to assure publicity and verity as to the real character of the article, so that taxables may be surely reached, so that the law may not be readily evaded. All this is incident to the *burden* of the tax; it is not unconstitutional regulation. It may be true that business has been affected, temporarily or even permanently—so far as markets may have been disturbed and conse quent readjustments made necessary—this again is an incident, a national incident and legitimate result of the *burden* of the tax.

The system under which spirituous and malt liquors and tobacco are taxed offer a precise counterpart. Is it not within the power of Congress to decide that the article oleomargarine shall be assimilated to these other articles in the method and manner of taxation?

No reason can be perceived why Congress may determine for itself the reasons and justifications for an onerous internal-revenue tax on strong drink and tobacco, and may *not* determine for itself the reasons for the taxation herein involved. If public morals and the general welfare are affected in both cases, it is for Congress to weigh and settle these considerations, however they may differ in degree or kind as applied to either case, and thereupon to assimilate the oleomargarine scheme to the scheme of taxing spirituous and malt liquors and tobacco. The analogy of the method, at least, if not of the essential elements, was evidently in the mind of Congress, because some of the laws affecting tobacco were *eo nomine* [in sec. 3] applied to oleomargarine. (Secs. 3232–3241, 3243, Rev. Stat.)

Congress, thus, for the purpose of assuring the collection of the tax, has imposed certain terms or conditions upon the manufacture of the article. In reality Congress prescribes no conditions in the nature of internal regulation, as to when, where, how, out of what ingredients, or by whom oleomargarine shall be manufactured. The fact is that Congress does not act upon the article until after it is manufactured and ready to enter into commerce. It takes the article as it finds it and says that upon the uncolored article a certain tax shall be paid and upon the colored a different tax. It interferes with no regulation by the States, but leaves them free to say whether within their limits

it may or may not be manufactured, and if so, in what manner and upon what conditions. This is not a regulation of or an interference with the power possessed by a State.

In *Nicol* v. *Ames* (173 U. S., 509) there was involved the validity of that provision of the war-revenue act of 1898 which imposed a tax upon all sales made at any exchange or board of trade. The act required that in making such sales a written memorandum thereof should be made, upon which the stamp, denoting the tax, should be placed. It was contended that this was an attempt on the part of Congress to regulate the making of contracts, and therefore an invasion of the powers of the States. But the court, speaking by Mr. Justice Peckham, held otherwise, saying (p. 523):

> The act does not assume to in any manner interfere with the laws of the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the terms of payment. The statute does not render a sale void without the memorandum or stamp which by the laws of the State would otherwise be valid. *It does not assume to enact anything in opposition* to the law of any State upon the subject of sales.
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> * * * * *
>
> The means actually adopted do not illegally interfere with or obstruct the internal

> commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal.

This language completely answers the similar contention made here.

In *Knowlton* v. *Moore* (178 U. S., 41) we find the same objection being made against the Federal inheritance tax then under discussion. It was insisted that in imposing a tax on legacies or successions, Congress was interfering with the power of the States to regulate the transmission or receipt of property by death. The court, speaking by Mr. Justice White, answers this argument in the following language (p. 59):

> But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the Government having the mission to regulate. But when it is accurately stated, the proposition denies

> the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct and many acknowledged objects of indirect taxation. * * * It can not be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since *it leads to the necessary* conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them.

Again (p. 60):

> Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established.

These cases seem conclusive upon the point that in imposing the tax in question Congress has not encroached upon or in any manner interfered with the power of the States to regulate the manufacture and sale of oleomargarine.

II.

THE LIMITATIONS UPON THE POWER OF CONGRESS TO IMPOSE EXCISES.

The tax, then, is clearly an excise and the law a revenue measure. This being true, what limitations are there to be found in the Constitution upon the taxing power of Congress? The power to lay the tax *in question* is conferred by Article I, section 8, clause 1 of the Constitution, which declares that—

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

The only limitation upon the power of Congress to impose excise taxes is the condition that they shall be uniform throughout the United States. What is the meaning of the word "uniform" as used in this clause of the Constitution?

In the *Head Money Cases* (112 U. S., 594), the court, speaking by Mr. Justice Miller, says that a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." And in *Knowlton* v. *Moore* (178 U. S., 106), the court, speaking by Mr. Justice White, says that "by the result then of an analysis of the history of the adoption of the Constitution

it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographic uniformity."

The tax, then, imposed by this law, is not open to the objection that it is not uniform in its operation.

III.

CONGRESS MAY CLASSIFY PROPERTY FOR PURPOSES OF TAXATION.

The proposition that Congress, in imposing taxes, may classify property for taxation is too well settled to need discussion. I refer the court to the case of *Magoun* v. *Illinois Trust and Savings Bank* (170 U. S., 283); to *Nicol* v. *Ames* (173 U. S., 509), and to the cases therein cited.

IV.

THE LIMITATIONS IMPOSED UPON THE TAXING POWER OF CONGRESS BY THE FIFTH AMENDMENT.

As shown in proposition II, the only restriction upon the power of Congress contained in that clause of the Constitution which confers the power to levy the tax, is that the excise when imposed shall be uniform throughout the United States. The tax laid here is in harmony with that restriction.

But it is insisted that the law violates those provisions of the fifth amendment, which declare that—

(*a*) No person shall be deprived of liberty or property without due process of law;

(*b*) Nor shall private property be taken for public use without just compensation.

As to the latter clause, it is sufficient to say that it refers only to a direct appropriation of property for public purposes, and not to a so-called "taking" as the effect of taxation, nor under the prohibitive result of State police laws. (*Legal Tender Cases*, 12 Wall., 551; *Transportation Co.* v. *Chicago*, 99 U. S., 642; *Mugler* v. *Kansas*, 123 U. S., 668.)

Loan Association v. *Topeka* (20 Wall., 655), cited by opposing counsel, does not affect this case. That was a suit to recover upon a bond issued in aid of a private enterprise, while the taxes imposed upon oleomargarine are paid into the Treasury of the United States and devoted to public uses. The limitation of the right of taxation recognized in that case was along "the line which distinguished the public use for which taxes may be assessed from the private use for which they may not."

As to the first clause of the Fifth Amendment referred to: Does this tax, when imposed upon colored oleomargarine, deprive the manufacturer or the dealer of his liberty or of his property without due process of law? No complaint seems to be made against the imposition of the tax of one-quarter cent per pound upon uncolored oleomargarine; the complaint is directed wholly against the imposition of the tax of 10 cents per pound

upon the artificially colored article. It is conceded, if this be a "legitimate" tax law, it is constitutional (Mr. Guthrie's brief, p. 34); but it is claimed that the exercise of the taxing power is a mere pretext "for the accomplishment of objects not entrusted to the Government;" that under the guise of taxing the attempt is made to regulate the manufacture of the article, which is beyond the power of Congress, that power being vested wholly in the States.

The original act (act of August 2, 1886, 24 Stat., 209) was entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," and imposed, in addition to certain license taxes, an excise of 2 cents upon each pound of oleomargarine manufactured and sold. The validity of the tax imposed by that act seems never to have been questioned; indeed, it was so clearly within the power of Congress that no one could reasonably hope to have it declared invalid. Certain features of it, however (the authority vested in the Commissioner of Internal Revenue to designate the manner in which oleomargarine should be branded), were assailed in *In re Kollock* (165 U. S., 526), but were sustained, with certain comments on the nature of the law, *ut supra*.

The act of May 9, 1902 (32 Stat., 193), after making some minor changes in the act of 1886 in section 3, amends section 8 of the original law by imposing a tax of one-fourth cent per pound upon

uncolored oleomargarine and a tax of 10 cents per pound upon oleomargarine when found to contain artificial coloring that causes it to look like butter. As shown by its title, this act provides for four things: (1) It makes oleomargarine and *other imitation* dairy products subject to the laws of the States and Territories into which they are transported; (2) changes the tax on oleomargarine; (3) imposes a tax upon and provides for the inspection, etc., of certain other imitation dairy products, viz, adulterated, process, or renovated butter, and (4) amends the act of 1886.

It will be observed by an inspection of the act that it provides for the taxation and regulation of "adulterated" and "process" or "renovated" butter, the tax upon the former being fixed at 10 cents per pound and upon the latter at one-fourth cent per pound. Special license taxes are imposed upon the manufacturers and the dealers therein. The oleomargarine regulations are made to apply to the butter taxed. Colored oleomargarine and adulterated butter are placed in the same category and taxed at 10 cents per pound, while process or renovated butter and uncolored oleomargarine are placed in a different class and taxed one-fourth cent per pound.

Taking, then, the act of 1886 and inserting in their proper places the amendments made by the act of 1902, we have a law which does nothing more than to impose specific taxes upon certain-named articles—colored and uncolored oleomarga-

rine, *inter alia*—the money received therefrom to be paid into the Treasury of the United States. Nothing else appears in the act, save the provisions providing for the collection of the tax and for the prevention of frauds upon the revenue. As held in *In re Kollock* (*supra*), the act primarily is a revenue act.

AS TO NOTICE, HEARING, AND RIGHT OF APPEAL.

In considering this phase of the question, viz, whether due process of law is provided, the distinction between an excise and a property tax must be kept in mind. What might not constitute due process in case of a property tax may clearly be so in the case of an excise. Generally, in case of a property tax, there is a valuation of the property by an assessing officer. The amount of the tax will depend, of course, upon the value placed upon the property by that officer. In such case, due process would require notice and an opportunity to be heard, at some time, in the matter of the tax.

But the tax here involved is an excise, a specific tax upon each pound of oleomargarine; the amount is fixed by law. The collection of the tax is devolved upon certain named officers—the Commissioner of Internal Revenue and his subordinate officers. These officers have fixed seats of office, open at all times, with opportunity to be heard. In case there is a disagreement between a collector and a manufacturer as to whether any article is

subject to the tax, or as to the rate of the tax, the article is to be submitted for the inspection of the Commissioner of Internal Revenue, whose decision is made final. (Section 14 of the act.) An appeal is therefore provided from the decision of the assessing officer to the Commissioner. In the case of a substance in oleomargarine alleged to be deleterious to health (section 14 of the original act of 1886) there is a further appeal from the decision of the Commissioner to a board composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Secretary of Agriculture, whose decision upon such matter is made final. There is a similar provision as to process butter under section 5 of the act of 1902.

Here, then, due notice is given by the law itself as to the liability to the tax; an appeal is provided from the decision of the collector to the Commissioner in case of a dispute respecting the taxability of the article; and a further appeal is allowed from the decision of the Commissioner where the article is claimed to be deleterious to health. So here is due notice, an opportunity for hearing, and for an appeal—in short, due process. The court has in a recent case broadly sustained executive proceedings as due process. (*The Japanese Immigrant case*, 189 U. S., 86.)

V.

"IMPLIED LIMITATIONS" UPON THE TAXING POWER.

Plaintiffs in error must concede that Congress has the power to impose an excise upon oleomargarine, and they offer to pay what they call a "fair tax." But they say this tax is excessive and confiscatory; therefore (in effect) they say that it loses its character as an excise and becomes something else—a prohibition upon the oleomargarine industry. And, while there is no express limitation in the Constitution upon the power of Congress to levy this variety of tax, other than that it shall be uniform, upon some notion of an implied limitation on Congress, inherent in that instrument, or upon some implied power in this court to revise the legislative action in laying a tax, although this court has disclaimed any such power, they ask the court to declare this tax invalid.

What has the court said with respect to the power of Congress to tax?

Beginning with *McCulloch* v. *Maryland* (4 Wheat., 316), we find Chief Justice Marshall saying (p. 431) that "the power to tax is the power to destroy." Counsel for the plaintiffs in error answer this by saying that it only shows "the dangers which lurk in a brilliant epigram."

Chief Justice Marshall said no idle word in his opinions. He did not utter brilliant epigrams. The characteristic mark of his judgments and of the reasoning and logic by which he enforced them

is that, tested by time and events, he thought out to the furthest reach of the human intellect the meaning of his language and traced its remotest bearings and effect. When he laid down his famous propositions, like this one, he was conscious of their fullest import and deliberately intended what they obviously meant. No one standing before this bar can doubt or challenge this fact, however sincerely he may think that no human intellect, even one of the greatest, is infallible.

Chief Justice Marshall then continues (p. 431):

> Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

Nothing is said about an implied limitation upon this power.

In *Gibbons* v. *Ogden* (9 Wheat., 1) we find Chief Justice Marshall, in defining the extent of the power of Congress to regulate commerce, again saying (p. 196):

> This power, *like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.* These [limitations] are expressed in plain terms. * * * The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are,

> in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments.

No intimation is to be found in this language about an implied power, lodged somewhere in the Constitution, which would authorize the court to declare void the laws of Congress imposing taxes in harmony with the limitations expressed therein.

But this view does not find expression alone in the opinions in *McCulloch* v. *Maryland* and *Gibbons* v. *Ogden*. Over and over again it has been repeated by this court down to the present time. Time and again has the court said that, subject to the exception that Congress can not tax exports, and to the restrictions that it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity, the power of taxation in Congress is unlimited; and that if the power be exercised oppressively, the appeal lies alone to the people and not to the courts.

Thus, speaking by Chief Justice Chase in the *License Tax Cases* (5 Wall., 462), the court says (p. 471):

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment, and

> indirect taxes by the rule of uniformity. *Thus limited, and thus only*, it reaches every subject, and may be exercised at discretion.

This language was quoted with approval in *Knowlton* v. *Moore* (178 U. S., 41), Mr. Justice White speaking for the court (p. 58):

> It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax Cases* (5 Wall., 462, 471), after referring to the limitations expressed in the Constitution, "thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion."

It is also quoted with approval by Mr. Justice White in his concurring opinion in the case of *Dooley* v. *United States* (183 U. S., 151, 166).

In *Pacific Insurance Co.* v. *Soule* (7 Wall., 433), the court, speaking by Mr. Justice Swayne, discussing the limitations of the Constitution upon the power of Congress to levy taxes, says (p. 443):

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. *Congress may prescribe the basis, fix the rates, and require payment as it may deem proper.* Within the limits of the Constitution it is supreme in its action. *No power of supervision or control is lodged in either of the other departments of the Government.*

Again (p. 446):

> The taxing power is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. *With these exceptions, the exercise of the power is, in all respects, unfettered.*

In *Austin* v. *The Alderman* (7 Wall., 694), Mr. Justice Swayne, delivering the opinion of the court, says (p. 699):

> The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

In *Veazie Bank* v. *Fenno* (8 Wall., 533), this court, speaking by Chief Justice Chase, in answering the contention that because the tax was oppressive, the court should declare the law invalid, says (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.
>
> The *first answer* to this is, that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised

> oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it can not, for that reason only, be pronounced contrary to the Constitution.

Opposing counsel (Mr. Guthrie's brief, p. 45) try to escape the effect of this language by stating that the tax was sustained upon the ground that Congress, in the exercise of its authority to regulate the currency, could adopt any suitable means for that purpose, and not upon the ground that the court could not interfere with the discretion of Congress in the imposition of the tax. The court sustained the tax upon both grounds. The court says that "the *first answer is* that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers." And then, after using the language above quoted, the court continues (p. 548):

> *But there is another answer* which vindicates *equally* the wisdom and the power of Congress.

And then proceeds to uphold the tax upon the further ground that Congress has the power to regulate the currency. So it was unnecessary, in deciding *Hepburn* v. *Griswold* (8 Wall., 603), and *National Bank* v. *United States* (101 U. S., 5, 6), to assign any reason for the judgments other than

that of the power to regulate the currency. In the *Hepburn* case, the question of taxation was neither involved nor raised; while in the *National Bank* case, the court follows the decision in the Veazie Bank case. The court says in the *Veazie Bank* case there are *two* reasons why the tax should not be declared invalid—because of its lack of power to prescribe a limitation upon Congress in exercising its legitimate functions, and because Congress has the authority to regulate the currency.

And Mr. Justice Gray, speaking for the court, in *Spencer* v. *Merchant* (125 U. S., 355), says:

> In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "*The judicial department can not prescribe to the legislative department limitations upon the exercise of its acknowledged powers.* The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

FURTHER AS TO THE SEPARATE POWERS OF THE THREE COORDINATE BRANCHES OF THE GOVERNMENT.

It is insisted (in effect) that this court should invade the province of the legislative branch of the Government, and, although acting within the limits of its acknowledged powers, should supervise its action. This, the court has said, it can not properly do.

Thus, in *Hayburn's Case* (2 Dallas, 410), the court said: "That by the Constitution of the United States, the Government thereof is divided into three distinct and independent branches, *and that it is the duty of each to abstain from, and to oppose, encroachments on either.*"

In *Calder* v. *Bull* (3 Dallas, 386), there was involved the validity of a resolution passed by the legislature of Connecticut, setting aside the decree of a court of probate of that State disapproving of a will and granting a new trial. This resolution, it was claimed, was *ex post facto*, and therefore void. But the court, each member delivering an opinion, held the term *ex post facto*, as used in the Federal Constitution, applied only to crimes, pains, and penalties. Mr. Justice Iredell, in his concurring opinion, points out that in Connecticut the legislature, or general court of that State, originally possessed and exercised all legislative, executive, and judicial authority, and that from time to time they distributed the two latter powers in such manner as they thought proper. Speaking then of a government in which these powers have been separated and vested in distinct branches, he discusses the power of one branch to declare void the acts of another when the latter is acting within the scope of its authority, saying (bottom p. 398):

> If, then, a government, composed of legislative, executive, and judicial departments were established by a constitution which

imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I can not think that, under such a government, any court of justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case "there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as to leave no doubt whether it was the intent of the legislature, or no." (1 Bl. Com., 91.)

In order, therefore, to guard against so great an evil, it has been the policy of all the American States, which have, individually, framed their State constitutions since the Revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a State, violate those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort

to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court can not pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest of men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: First, if the legislature pursue the authority delegated to them, their acts are valid. Second, if they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act. * * *

It is not sufficient to urge, that the power may be abused, for, such is the nature of all power—such is the tendency of every human institution; and it might as fairly

> be said, that the power of taxation, which is only circumscribed by the discretion of the body, in which it is vested, ought not to be granted, because the legislature, disregarding its true objects, might, for visionary and useless projects, impose a tax to the amount of nineteen shillings in the pound. We must be content to limit power where we can, and where we can not, consistently with its use, we must be content to repose a salutary confidence. It is our consolation that there never existed a government, in ancient or modern times, more free from danger in this respect than the Governments of America.

In *Griswold* v. *Hepburn* (8 Wall., 603) Mr. Justice Miller (with whom concurred Mr. Justice Swayne and Mr. Justice Davis) in his dissenting opinion comments upon the opinion of the court in declaring the act of 1862, making the notes and bills of the United States a legal tender for the payment of all debts, to be inconsistent with the Constitution, saying (pp. 637, 638):

> But it is said that the law is in conflict with the spirit, if not the letter, of several provisions of the Constitution. * * *
>
> This whole argument of the injustice of the law, an injustice which if it ever existed, will be repeated by now holding it wholly void, and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is, above all, dangerous as a ground

on which to declare the legislation of Congress void by the decision of a court. It would authorize this court to enforce theoretical views of the genius of the Government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. *It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the National Legislature.*

Such is not my idea of the relative functions of the legislative and judicial departments of the Government. Where there is a choice of means the selection is with Congress, not the court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the legislature and not for the court to determine.

The decision of the court in this case was overruled, in part, in the *Legal Tender cases* heard before the entire court; and the views above expressed by Mr. Justice Miller are not only in harmony with the ultimate decision of the court in the Legal Tender cases, which is settled law to-day, but are in strict accordance with many earlier and later decisions of this court as here reviewed.

In the *Legal Tender cases* (12 Wall., 457) the court, answering the objection that the Legal Tender acts were prohibited by the spirit of the Fifth Amendment, which forbids the taking of private

property for public use without just compensation or due process of law, says (p. 551) that "that provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."

Further answering this contention, the court continues (p. 552):

> Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; *and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.*

Respecting the division of powers under the Federal Constitution, this court, speaking through Mr. Justice Miller, in *Kilborn* v. *Thompson* (103 U. S., 168), says (p. 190):

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to governments, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these respective departments shall be broadly and clearly defined. *It is also essential to the successful working of this system that the persons intrusted with power in any*

> *one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.*

In *Treat* v. *White* (181 U. S., 264) there was involved the validity of the provision of section 25, Schedule A, of the war-revenue act of June 13, 1898 (30 Stat., 458), which imposed a tax of 2 cents on each $100 in value of all sales, or agreements to sell, etc., shares or certificates of stock in any association, company, or corporation.

It was contended that this provision was invalid because, while imposing the tax upon all sales, agreements of sale and agreements to sell, such shares or certificates of stock, it imposed no tax upon agreements to buy such stocks. Respecting this contention, the court, speaking by Mr. Justice Brewer, says (bottom p. 268):

> That no stamp duty was imposed on agreements to buy furnishes no ground for denying the validity of the stamp duty on agreements to sell. The power of Congress in this direction is unlimited. *It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty and agreements to buy not.* It is enough that Congress in this legislation has imposed a stamp duty upon the one and not upon the other.

In *Patton* v. *Brady, Collector* (184 U. S., 608), the court, speaking by Mr. Justice Brewer, overruled a similar contention, saying (p. 623):

> Our conclusion, then, is that it is within the power of Congress to increase an excise as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; *that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed.*

In *Champion* v. *Ames* (188 U. S., 321), speaking in respect of the right of this court to interfere with the discretion of Congress when acting within the scope of its power, Mr. Justice Harlan, delivering the opinion, says (p. 363):

> But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The Constitution has provided the authority and the method for proper revision of legislative action in the veto power conferred on the President by Article I, section 7, clause 2. To the Executive, then, is given the right to supervise and check legislation which he deems, in the exercise of his constitutional power of judgment and discretion, to be unwise or unjust.

For these reasons the conclusion seems irresistible that Congress, having acted clearly within the scope of its undoubted power in imposing this excise, this court is not invested with authority to review the discretion reposed in that body by the people and to declare the tax invalid if, perchance, in its opinion, the tax may seem to be oppressive. To do so, as shown by Mr. Justice Iredell in *Calder* v. *Bull*, would merely be to substitute the judicial judgment for that of the legislative power. As the court has said, if Congress has abused its power the remedy lies with the people and not in the courts.

VI.

SECTION 14 DOES NOT CONFER JUDICIAL POWER UPON THE COMMISSIONER OF INTERNAL REVENUE; OR, SO FAR AS IT MAY INCLUDE A QUASI-JUDICIAL FUNCTION, IT IS VALID UNDER THE DECISIONS OF THE COURT.

Counsel also except to the following provision of section 14 of the act:

> And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for

> his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final.

It is claimed that this is an attempt on the part of Congress to confer upon an executive officer judicial power. But it is not. It is nothing more than a conferring of authority to ascertain facts, and to apply the law to the facts when ascertained. True, it is a quasi-judicial power; but every taxing officer is invested with that. There is a great distinction between such authority and judicial power within the meaning of the Constitution. The Commissioner in determining whether an article is oleomargarine, or whether it is artificially colored, does not hear and decide a case as a judge does. He simply exercises the judgment and discretion generally required of all administrative officers, and specifically required under many laws, similar in principle, which have been sustained by the court. In order to a correct determination of the facts an analytical chemist and a microscopist are furnished who make the tests necessary to determine the character of the article. This, in the case of oleomargarine, is but the determination of a scientific fact by a scientific process. His decision must be based upon the result of these tests, and the testimony of the experts making them. If the matter were committed to the decision of a court the court would be compelled to determine the question upon the same test and

upon the testimony of like experts. And so if the matter were submitted to a jury. There is no reason why an executive officer may not decide questions of this character in matters of taxation. The question is purely one of fact; the principle of judicial power is not involved. This is not a matter involving title to property, or a right of action against some adversary party; it is not the subject of a suit at common law, or in equity, or admiralty; it is but the ascertainment of certain facts in a matter of taxation and applying the law to those facts.

In support of the position of the Government that the provision challenged is not an attempt to confer judicial power within the constitutional meaning of the term, the attention of the court is called to the following cases:

In *Martin* v. *Mott* (12 Wheat., 19, 29, 31) there was involved the validity of the act of Congress of 1795, which conferred upon the President the power to call upon the militia of the States to prevent invasion, etc. The court upheld the act, holding that Congress had the right to vest exclusively in the President this power, and that his decision upon the matters so committed to him is conclusive upon all other persons.

In *Railroad Co.* v. *Stimpson* (14 Peters, 448, 458), the court held (p. 458) that where the law confers upon an officer the authority to do certain acts, upon evidence and proofs to be laid before him,

no other tribunal is at liberty to reexamine or controvert the sufficiency of such proofs when the law has made such officer the proper judge of their sufficiency and competency.

Murray's Lessees v. *Hoboken Land Company* (18 How., 272).

There was involved in this leading case the power of Congress to vest in the accounting officers of the Treasury the authority to examine the accounts of collectors, to ascertain any balances due, upon which finding distress warrants might issue for any sums so found due the Government from the collectors. It was contended that by so providing in the act of May 15, 1820, Congress attempted to confer upon executive officers judicial powers, and further, that such a taking of property would be without due process of law. Discussing these objections, the court, speaking by Mr. Justice Curtis, says (bottom p. 275):

> Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of customs, from whom a balance of account has been found to be due by accounting officers of the Treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law.

The court, after discussing the nature of the power conferred, and the history and meaning of due process of law, held that the power conferred *was not judicial*, in the sense in which that term is used in the Constitution, and that due process of law had been provided, saying (p. 280):

> That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. (*United States* v. *Ferreira*, 13 How., 40.) It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution.

Again (p. 284):

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter

> which, from its nature, is the subject of a suit at common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. * * * Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title (citing cases).

The question involved in the cases here before the court is not "the subject of a suit at common law, or in equity, or admiralty."

Again (p. 282):

> It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others.

Speaking with respect to the nature of the power conferred upon the officers of the General Land Office, and of the power of a court of equity to review their action in cases of fraud, etc., this court, speaking by Mr. Justice Matthews in *Craig* v. *Leitensdorfer* (123 U. S., 189), says (p. 211):

> This doctrine is undoubtedly true, but its limitation is found in the statement that such rulings "may be reviewed and annulled by the courts when a controversy arises founded upon their decisions." The jurisdiction to determine such questions does not arise in the courts of the United States by virtue of any power of supervision given to them whereby they have a right to control, to correct, to reverse, and to dictate the procedure and action of executive officers within the scope of the duties confided to them by law. No such power of revision is given, and none such can be exercised. *Such a function is not judicial; it is administrative, executive, and political in its nature.*

In *Bushnell* v. *Leland* (164 U. S., 684), it was claimed that the power vested in the Comptroller of the Currency to appoint a receiver for an insolvent bank, etc., was unconstitutional. The court answers this claim by saying (bottom p. 685) that "all of these contentions have been long since settled, and are not open to further discussion." Citing *Kennedy* v. *Gibson*, 8 Wall., 498; *Casey* v. *Galli*, 94 U. S., 673; *United States* v. *Knox*, 102 U. S., 422.

The court, speaking by Mr. Justice Gray in *Fong Yue Ting* v. *United States* (149 U. S., 698, 714), said:

> It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.

The court then cites instances in which such questions have been vested in executive officers for determination. Thus the power has been vested in the President alone to surrender fugitives from the justice of other countries, vesting in the Secretary of the Treasury the power to determine claims for the recovery of duties illegally exacted, citing cases (p. 714).

The court, speaking by Mr. Justice Harlan, reaffirmed this principle in *Lem Moon Sing* v. *United States* (158 U. S., 538, 544), quoting with approval the following passage from *Nishimura Ekiu* v. *United States* (142 U. S., 651, 660):

> But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer to

> be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) the court, speaking by the Chief Justice and referring to the findings of fact by a United States commissioner under the Chinese exclusion laws, again sustained the principle of the finality of such findings.

In *United States* v. *Moline* (82 Fed. Rep., 592) the authority of the Secretary of War to determine whether a particular structure is an obstacle to navigation is held to be a purely administrative function and to be a valid delegation of power by Congress.

See also *Chatfield* v. *New Haven* (110 Fed. Rep., 788).

The power to impose certain requirements by Department regulations, in pursuance of a law which was challenged as an illegal delegation of judicial power, just as the power to determine facts here is so challenged, has been upheld in numerous cases, in accordance with the rule in *In re Kollock* (*supra*); among others, in *Grady* v. *United States* (98 Fed. Rep., 238), respecting a power conferred upon the Postmaster-General to make rules and regulations under the postal laws;

and in *Dastervignes* v. *United States* (122 Fed. Rep., 30), respecting the authority of the Secretary of the Interior to make regulations as to forest-reserve lands.

In *Weimer* v. *Bunbury* (30 Mich., 201) there was involved a State law authorizing summary proceedings under certain circumstances to recover from a delinquent officer taxes which he had collected but failed to cover into the treasury. Judge Cooley delivered the opinion of the court, and discusses the meaning of "due process" and "judicial process," saying (p. 211):

> There is nothing in these words, however, that necessarily implies that *due process* of law must be *judicial process*. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. * * * But the proceedings for the collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms and without the intervention of the judicial authority, the few cases in which statutes have required the action of courts being exceptional. Where such action is not required, the proceedings are regarded as purely administrative, and any hearing allowed to parties in their progress has not been in the nature of a trial, *but as a means of enlightening the revenue officers upon the facts which should govern their action*. This has been so from time immemorial, and it

> has never been supposed that the taxpayer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix the amount.

These views exactly apply to the present situation and to the method of procedure provided by the law.

Judge Cooley continues (bottom p. 212):

> There are, unquestionably, cases in which expressions have been used implying the necessity for a common-law trial before, in any instance, a man can be deprived of his property; but they will be found on investigation to be cases calling for no such sweeping statement. *If any court has ever decided that judicial proceedings are of constitutional necessity in appropriating property under the power of taxation, the case has not been brought to our attention, and has been overlooked in our investigation.* * * * *Administrative process of the customary sort is as much due process of law as judicial process.* We should meet a great many unexpected and very serious embarrassments in government if this were otherwise.

In *State* v. *Harmon* (31 Ohio St., 250), it was claimed that the action of the State senate in deciding a contested election of a judge of a court was void, being an exercise of judicial power. Respecting this the court says (p. 258):

> It is said authority to hear and determine

a controversy upon the law and fact is judicial power.

That such authority is essential to the exercise of judicial power, is admitted; but it does not follow that the exercise of such authority is necessarily the exercise of judicial power.

The authority to ascertain facts, and to apply the law to the facts when ascertained, appertains as well to the other departments of the Government as to the judiciary. Judgment and discretion are required to be exercised by all the departments.

See also *Musser* v. *Adair* (55 Ohio St., 466); *Anderson* v. *Timme* (60 Wis., 344); *Donahue* v. *Will County* (100 Ill., 107–110).

VII.

THE EFFECT OF THE ALLEGED VOID PROVISION AND AMENDMENT.

It is suggested that in case the provision in section 14 of the original act, and the amendment of section 8 of that act by section 3 of act of 1902, be held void, the entire law falls, and counsel refer to a number of cases which bear upon the question of void amendments as working a repeal of the law. These authorities do not, however, meet the question here.

This is not a penal law, but a revenue measure, and therefore its provisions are to be liberally construed. If the court were to hold invalid that provision of section 14 which confers upon the

Commissioner authority to determine finally what substances are subject to the tax, the only effect would be to take from that officer finality of decision; and upon a prosecution for the purpose of imposing punishment, or a suit to recover a penalty, that question might be gone into anew. The act would be complete without that provision, and the only effect such a decision could have would be to strike the provision from the act. As said by this court, speaking through Mr. Justice Harlan, in *Field* v. *Clark* (143 U. S., 649, 696, 697):

> Unless it is impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid.

It is also a well-settled rule that where certain parts of an act are void, and other parts valid, if the valid portions are separable and, standing alone, will fully carry out the purposes of the act, the court will not declare the whole act void, but will give effect to the valid provisions. (*Packet Co.* v. *Keokuk*, 95 U. S., 89; *Allen* v. *Louisiana*, 103 U. S., 83–84; *Railroad Co.* v. *Schutte*, 103 U. S., 142; *Penniman's Case*, 103 U. S., 716–717; *Supervisors* v. *Stanley*, 105 U. S., 312; *Virginia Coupon cases*, 114 U. S., 304; *Presser* v. *Illinois*, 116 U. S., 263–264; *Huntington* v. *Worthen*, 120 U. S., 102; *Eilenbecker* v. *Plymouth County*, 134 U. S., 40; *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 636.)

The cases of *Spraige* v. *Thompson* (118 U. S., 94) and *James* v. *Bowman* (190 U. S., 141), cited by counsel, are not to the contrary. The laws involved in those cases were declared wholly void, because to give effect to the valid portions only would be to extend the operation of the laws beyond the intention of the legislative body, and, to that extent, would be judicial legislation. And the *Spraige* case has been so distinguished by this court. (*Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 636.)

So, in the *Trade-Mark Cases* (100 U. S., 82, 98), the court held the entire act invalid for the reason that to hold the statutes valid in so far as they applied to trade-marks used in commerce with foreign nations and among the several States would be to give to the words used by Congress a narrower meaning than they were manifestly intended to bear, a power not within the judicial province.

No one will pretend to say that, by declaring void the provision of section 14 called in question, the act can not be fully carried into effect; or that, but for that provision, Congress would not have enacted this legislation. That provision is not material to the imposition and collection of the tax, but is merely an incident to facilitate its collection.

With respect to amended section 8, conceding, merely for the purposes of argument, that the amended section is void, what effect will that

have upon the original law? What effect does a void amendment have upon a valid law? The Government contends that if the amendment be void, since there is no express repeal in the act of 1902 of any provision of the act of 1886, section 8, as enacted by the law of 1886, is in full force, and therefore that all oleomargarine, irrespective of its color, is subject to a tax of 2 cents per pound. This must be so if the amendment be void, for, as said by Mr. Justice Harlan, speaking for the court in *Norton* v. *Shelby County* (118 U. S., 442):

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

If Congress had, by express language, repealed the old law, the amendment of 1902 being held void, there would, of course, be in existence no law imposing a tax upon the article. But the act of 1902 does not, by express language, or by any language or implication, repeal any provision of any law; hence, if the amendment of section 8 is of no effect, the original section is in full force.

VIII.

REPLY TO THE BRIEFS FOR PLAINTIFFS IN ERROR.

In discussing the issues raised by these cases, reference has heretofore been made to the points suggested in the briefs of opposing counsel only so far as necessary to carry out the general line of

argument presented. I now take up the objections more at large.

(1) The act is a revenue measure, and does not attempt to regulate the manufacture of oleomargarine.

I have already touched upon this question, contending that there is no interference with State powers and that Congress has the power to select the objects of taxation, to determine the rate, and to provide the means for the collection of the tax. Having the power to designate the manner of the collection of the tax, it may throw around its collection such safeguards as, in its judgment, it deems necessary in order to prevent frauds upon its revenue. In the determination of the rate and in the selection of the means of enforcement, Congress may take into consideration the character of the article to be taxed, the purpose for which it is used, its methods of use, and the probability of fraud for the purpose of evading the tax. In passing this law, therefore, Congress could properly take into consideration all facts of which it had knowledge, or which might be brought to its notice respecting the character of oleomargarine, the uses to which it is put, the manner of its use, and, acting upon that information, lay the tax and provide for its collection, using such means as it deemed appropriate and necessary.

Counsel for the Chicago dealers in their brief (p. 17) concede that in examining into the motive

or purpose which Congress had in view in passing the act, it is not proper to refer to the debates; and counsel for McCray, while conceding the rule (brief, p. 14), quotes certain extracts from the debates as "illustrative of the history of the law and the condition of the country and existing legislation at the time it was passed." But the extracts quoted show only the views of those quoted as to the purpose of the tax, which this court will not consider. The rule upon this point is stated by Mr. Justice Davis in *United States* v. *Union Pacific Railroad Co.* (91 U. S., 79) in this language:

> In construing an act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*Aldridge* v. *Williams*, 3 How., 24; *Preston* v. *Browder*, 1 Wheat., 120.)

And, in *Soon Hing* v. *Crowley* (113 U. S., 703, 710), the rule is stated in these words, Mr. Justice Field delivering the opinion:

> The rule is general with reference to the enactments of all legislative bodies that the courts can not inquire into the motives of

> the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.

And this rule has been reaffirmed in *Powell* v. *Penna.*, 127 U. S., 685, 686; *United States* v. *Freight Association*, 166 U. S., 318; *Camfield* v. *United States*, 167 U. S., 523; *Dunlap* v. *United States*, 173 U. S., 75; *Maxwell* v. *Dow*, 176 U. S., 601; *Knowlton* v. *Moore*, 178 U. S., 72, and other cases. See also *Dobbins* v. *Los Angeles*, 72 Pacific Rep., 971; Cooley's Const. Lim. (6th ed.), page 231.

The reasonable presumption is that Congress in imposing this tax acted with full knowledge of all the facts respecting the subject-matter thereof, and because of such facts imposed the tax in question. Now, what facts did Congress have before it respecting oleomargarine of which this court will take judicial notice; and as bearing

upon that question, of what facts will this court take judicial notice?

In *Brown* v. *Piper* (91 U. S., 42, 43) the court said that "the courts of the United States take judicial notice of the laws and jurisprudence of the several States in which they exercise jurisdiction;" and that "courts will take notice of whatever is generally known within the limits of their jurisdiction." And this rule was adhered to in *Brown* v. *Spillman* (155 U. S., 670). In *Mills* v. *Green* (159 U. S., 657) it is said that "the lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the constitution and public laws of each State of the Union." In *Bank of Kentucky* v. *Adams Express Co.* (93 U. S., 185) the court says it can not close its eyes to the well-known course of business in the country. So in *Nicol* v. *Ames* (173 U. S., 517) the court says it has "the right to consider facts without particular proof of them, which are universally recognized and which relate to the common and ordinary way of doing business throughout the country." In *The Delaware* (161 U. S., 472) the court, in substance, says that it will take judicial notice of that which is a part of the history of the times. In *United States* v. *Rio Grande Dam and Irrigation Co.* (174 U. S., 698) the court says that it will take judicial notice of that which is a matter of common knowledge within its jurisdiction. In *Bank of Augusta* v. *Earle* (13 Pet., 590, 591) the

court takes judicial notice of general usages of commerce and trade.

In *New York Indians* v. *United States* (170 U. S., 32), with respect to matters of which it will take judicial notice, the court, speaking by Mr. Justice Brown, says:

> While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.

See also 1 Greenleaf on Evidence, sections 5 and 6.

So that the court will not explore the motives of legislators as drawn from debates, but will notice well-known facts and situations in the life and business of the times.

It becomes important here to point out the well known facts, not only for the purpose of showing the fundamental state of affairs upon which the will of Congress acted and that Congress was justified in laying the discriminating tax upon the colored article, but also as showing that, because of the character and magnitude of the traffic in that article, Congress might properly impose the heavy tax upon it not only for direct revenue thereon but also for the purpose of preventing frauds upon the revenue in the collection of the tax upon the uncolored article. In short, opening the

door *pro arguendo* to facts properly excluded by the courts below, the Government contends that the discriminating tax of 10 cents per pound upon the colored oleomargarine can be sustained upon two grounds: (1) That the classification is proper because the uncolored article can only be sold for what it really is, and at its true value; that the sole purpose or the main purpose of coloring oleomargarine is to make it so closely resemble butter (an article of double its value) that it may very readily be sold as and for butter, and at double the price that can be obtained for it when sold for what it really is; that even if it is candidly *sold* for what it really is, it is likely to be unwittingly *consumed* for the genuine article which it resembles. Thus the line is drawn between legitimate commerce and a trade which, even if recognized, is at least disingenuous and doubtful. (2) Congress having full knowledge of the character and magnitude of the trade in butter and its imitations, and of the nature and incidents of the business in colored oleomargarine, may, as part of its entire revenue scheme and incidentally to detect and prevent fraud in collection, distinguish the colored and uncolored articles and lay a heavy tax upon the colored article, inevitably imitative and fraudulent in effect.

(2) Further as to the propriety of the classification.

It becomes necessary, then, to call attention to the magnitude of the traffic in the colored article

and to its character, and, as showing that fact, to the prohibitions and restrictions placed by the States upon the sale of the article.

The court has said that it will take judicial notice of the laws and jurisprudence of the States of the Union; and the court is consequently presumed to know that forty-two States and Territories of the Union have passed stringent laws requiring the branding of all oleomargarine (whether colored or uncolored) manufactured or sold therein, so as to advise all purchasers of its true character, and requiring dealers engaged in selling it to give due notice to their customers to that effect; and requiring hotels and restaurants to advise their patrons in case they use oleomargarine as a substitute for butter. The court is also presumed to know that twenty-nine States[a] of this Union have absolutely prohibited the manufacture and sale (in one[b] instance the sale alone) of all oleomargarine colored so as to resemble butter; and heavy penalties are provided by the forty-two States and Territories for any violation of these laws. In addition to this, most of the remaining States have laws prohibiting the false branding of any article of food, which would prohibit the selling of oleomargarine for anything other than it really is.

[a] Alabama, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, West Virginia, and Wisconsin.

[b] Missouri, while permitting the manufacture, prohibits the sale of colored oleomargarine.

West Virginia requires all oleomargarine to be colored pink.

For the information of the court a condensed summary of the laws of the States and Territories regulating the manufacture and sale of oleomargarine is printed as an appendix to this brief and marked "Appendix B."

Congress must be presumed to have been aware of all these laws, and of all the incidents of the trade upon which they operated, supply, demand, use, profits—profits obviously very great and properly enough burdened accordingly. Congress legislated, no doubt, and it was entirely right for Congress so to legislate, in the light of these widespread laws and the universal situation which they revealed.

Is there not a sufficient distinction between uncolored oleomargarine which can only be sold for what it really is, at, perhaps, from 10 to 12 cents per pound, and the same article disguised by means of a little coloring matter so as to resemble and to be sold for the best creamery butter at from 20 to 24 cents per pound, to justify Congress in classifying the two forms of the article for purposes of taxation? The dealers say Congress can not make this distinction, this classification for taxation. But they concede the distinction for purposes of sale while denying it for purposes of taxation. In their testimony and in the briefs of their counsel they recognize a distinction. They complain that they can not sell the uncolored article as a substitute for butter. It is not unfair

to suggest that the real complaint is that unlike colored oleomargarine it can not be sold as and for butter. But they say the colored article they can sell as a *substitute* for creamery butter. Now, however it may be sold, it is notoriously used and consumed *as and for* creamery butter.

A line of cases in this court and in lower Federal courts deals with oleomargarine under State laws, and with certain aspects of this law presenting the real and essential nature of the business. We cite the cases of *Powell* v. *Penna.*, 127 U. S., 678; *Plumley* v. *Mass.*, 155 U. S., 461; *Schollenberger* v. *Penna.*, 171 U. S., 1; *Collins* v. *New Hampshire*, 171 U. S., 30; *Capital City Dairy Co.* v. *Ohio*, 183 U. S., 238; *In re Kollock*, 165 U. S., 526; *Wilkins* v. *United States*, 96 F. R., 837; *United States* v. *Dougherty*, 101 F. R., 439; *Dougherty* v. *United States*, 108 F. R., 56.

In the decisions of this court cited the court recognizes a distinction based upon the character of the article and the traffic by declaring that a State may prohibit the use of a counterfeit article. Thus in the *Plumley case* the court, speaking by Mr. Justice Harlan, says (p. 478):

> We are of the opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of

> which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy.

It is quite certain that if the State of Massachusetts had attempted arbitrarily and without good reason to exclude a legitimate and meritorious article of commerce (meritorious, because not seeking or not likely to deceive), this court would not have sustained the law.

There is, then, a clear distinction, a classification or difference recognized by the States in their legislation. The correctness of that distinction has been recognized by this court. So, Congress in imposing the different rates of tax does not arbitrarily create the classification; it finds it already existing, created by the States, recognized by the courts, and lays the tax accordingly.

(3) The tax may be sustained as a means to prevent fraud in the collection of the tax laid upon the legitimate article.

It is a well-established rule that this court will not declare a tax invalid if it can be sustained upon any ground; and, further, that to prevent fraud in the collection of a tax Congress may provide such safeguards as it deems proper. This tax of 10 cents per pound upon the colored article may also be sustained upon the theory that it is a regulation declared by Congress as a means of preventing fraud in the collection of the tax imposed upon the legitimate article, uncolored oleomargarine.

The court may not deem it any more proper to inspect the debates for information as to the purpose and conception of legislators in urging a law than as to their individual opinions as to its intention, or meaning, or effect. Therefore, I submit, with reserve, the suggestion that the debates show a belief or conviction that the high tax on colored oleomargarine was necessary and was justified to prevent fraud in the collection of the tax upon the uncolored article; that is, the genuine variety, as it were, of oleomargarine. The argument is about as follows: The tax of 10 cents per pound imposed upon the imitative article is a regulatory tax legitimately imposed in aid of the collection of the tax levied upon the genuine article; that is, uncolored oleomargarine. There is no tax upon pure butter, and if oleomargarine is so made and colored as not to be distinguishable from butter it might evade the tax imposed upon it. When an article taxed is made to counterfeit an article not subject to tax, Congress may put upon it a higher tax in order to secure identification of the genuine article as against the fraud or counterfeit, which, if successful, evades the tax intended to be imposed upon the genuine article. The degree of the regulatory tax upon the counterfeit or imitation is for Congress, having due regard for the welfare of the people, to determine. (Cong. Rec., 57th Cong., 1st sess.; remarks by Senator Hoar, pp. 3280–3282; Senator Spooner, pp. 3505–3506.)

Again, the law involved here imposes license fees upon the manufacturer and the retail dealer. In aid of the collection of these fees, Congress has the power to impose an added tax upon the counterfeit (I use that term in this brief not as an animadversion, but as conveniently describing the fact), for the reason that, if only the counterfeit passes into the hands of the retail dealer, it will be difficult to tell, without a scientific test, whether the colored article is butter or oleomargarine, thus rendering the tax more doubtful of collection. So, we repeat, that Congress, when taxing an article, has the power to compel the manufacturer of that article to disclose what he is doing; and that if he so disguises the article taxed as to make it possible for an evil disposition readily to escape taxation, Congress may prevent such chance of fraud either by the imposition of a heavy tax, or by such other regulations as it deems suitable to accomplish the purpose.

It rests with Congress to say what means it will adopt to accomplish this purpose.

In the case of *United States* v. *132 Packages of Spirituous Liquors* (76 Fed. Rep., 364) there was involved the validity and construction of section 3449 of the Revised Statutes which prohibits the removing, shipping, or transporting of any spirituous or fermented liquors under any other than the proper name or brand known to the trade. It was contended that this was merely a trade-mark

regulation and beyond the power of Congress, but the court held otherwise, Caldwell, circuit judge, saying (p. 367):

> The contention of the learned counsel for the claimant that this section is nothing but a trade-mark regulation is not tenable. It is one of the numerous regulations prescribed by the internal-revenue laws intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product, and its removal, shipment, and sale. * * * Before a court would be authorized to hold an act of Congress obsolete and inoperative, it would have to appear conclusively that it was *totally inoperative for any lawful or useful purpose*. When the statute relates to a subject-matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose. * * * The section is *none the less a revenue regulation* because its enforcement may tend to discourage the piracy of trade-marks, and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute, and not its primary object.

> Congress has an undoubted right to legislate to prevent frauds upon the public revenue, and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

In *Nicol* v. *Ames* (*ut supra*) the court said: "Other means [than a certain memorandum required by law] might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress and its decision must be conclusive in that respect." To assure the revenue purpose, in other words; to make certain the collection of the tax.

So in *Felsenheld* v. *United States* (186 U. S., 126) the court sustained the power of Congress to prohibit the placing of anything whatever on or inside any package of tobacco. It was claimed that Congress had no power to do this; that it was an attempt to exercise a police power, and that Congress could not pass any provision except such as were helpful to the collection of the tax. The court, speaking by Mr. Justice Brewer, answers this in these words (p. 131):

> Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that

the only matter in which the National Government is concerned is the tax; that it is in no manner responsible for what goes into the commercial world covered by its stamp; that it has no police power, no duty of caring for the health or safety of citizens or others who buy articles upon which its stamp is placed; that it does not guarantee either quantity or quality, and, in short, that its power is limited to such provisions as are essential or helpful in the collection of the tax.

It may be conceded that the Government's stamp is not a guaranty of quantity or quality, and that no responsibility attaches to it, although the manufacturer puts into the packages less than the specified quantity of goods or goods of inferior quality. But does it follow that the Government has no power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed? Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the Government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the Government take the money, affix its stamp,and thus in effect certify that the contents are that which it has imposed a tax upon? Manufactured goods are not

necessarily sold in this country, but may be shipped to other countries and sold there, and can it be that the stamp of this Government is absolutely worthless as an assurance that that which is within the package is the article which the Government purports to have taxed? It is one thing to say that the Government's stamp is not a guarantee of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting something which is not that which is stamped, but it is a very different thing to hold that the Government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. Whatever courts may rule as to the constitutional limits of the power of Congress, the great majority of people here and elsewhere will believe in and rely upon the truthfulness of a certificate made by the Government, and will be shocked to be told that it means nothing to them, but only money to the Government.

It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal-revenue tax, *Congress may prescribe any rule or regulation which is not in itself unreasonable.*

May not the Government legislate to this end by the amount of a certain tax as well as by prescribing certain incidental regulations?

The court is so familiar with the various provisions enacted for the purpose of preventing frauds in the collection of the revenue upon liquors and tobacco that it is not necessary to mention them. But we call the attention of the court to the act of March 3, 1897 (29 Stat., 626), providing for the bottling of spirits in bond, as showing the control Congress believes it has over articles which it taxes, which implies something more than a naked power to tax; and as going along with that power a right to say that its stamp denoting the payment of a tax upon a certain article, can not be used upon an article different in character, quality, or amount, from that denoted by the tax.

It is pertinent to say here that I perceive no reason for any fundamental distinction between the cases of liquors and tobacco and that of oleomargarine. All three invoke the taxing power and rest under the burden of heavy taxes. Each presents a certain special situation, common throughout the country and notorious, and upon such well-known situations Congress has acted. Each presents, as moving the taxing power, certain features which involve considerations of general welfare. In each the traffic, while recognized as commerce, rests under a certain ban, a different ban in each case, but referable to the same general principles. The idea of an article, the consumption of which is to be watched and regulated on grounds of general welfare founded in physical and mental hygiene and morals, is

present in the first two cases. The object of revenue and the notions of evasion, counterfeit, and the prevention of fraud on the revenue are common to all. The similarity of the two sets of laws was recognized in *In re Kollock*.

The case of *United States* v. *Singer* (15 Wall., 111) is similar, in some respects, to the case at bar.

In delivering the opinion of the court, Mr. Justice Field, after referring to many of the sections and provisions of the law involved, says (p. 120):

> The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the Government tax; and it seems well suited to accomplish this purpose. It at least reduces the limits within which fraud can be practiced to 20 per cent of the capacity of the distillery. In view of the enormous frauds previously practiced upon the Government in rendering accounts, this system can not be justly charged with unnecessary harshness. Everyone is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distill at all, he is not entitled to much consideration.

In *United States* v. *Three Packages of Distilled Spirits* (recently decided; United States district court, eastern district of Missouri), reported in

Treasury Decisions of October 1, 1903, there was involved the construction of section 3455, Revised Statutes, which makes it unlawful to sell any empty barrel or other package which has contained any article or product upon which an internal-revenue tax has been paid, without first destroying the stamps thereon, etc. In discussing the reasons for the statute, Judge Amidon says:

> It is said in many of the decisions to which reference has already been made that the primary object of the internal-revenue law is to prevent frauds upon the revenue. That is no doubt true, but what will best accomplish that purpose is a matter for legislative, not judicial, discretion. In the judgment of Congress, there are many classes of acts which ought to be prohibited because of the possibility of their being done for the purpose of defrauding the revenue.

If it is within the power of Congress to say what regulations are necessary or proper for the purpose of preventing frauds upon any branch of its revenue, then may it not impose a heavier tax upon an article, itself constituting the means by which a fraud may be accomplished, rather than by the adoption of some particular system of regulations, as in the case of distilled liquors?

(4) The tax is not prohibitive of the manufacture and sale of colored oleomargarine.

Reduced to its last analysis, the argument for the dealers is that the tax is unconstitutional because prohibitive of manufacture and sale.

As to the allied point that Congress was interfering with the States, I say again that the act of 1902 shows upon its face that Congress was exercising the taxing power alone. This is apparent from a reading of the whole act, and especially section 5, which relates to process butter. In that section Congress exercises its power to regulate interstate or foreign commerce. That section confers upon the Secretary of Agriculture the power of inspection, and prohibits the entering into interstate (not State) commerce of any butter not bearing the inspection brands of that officer. But nowhere in the sections relating to oleomargarine is any such power, or any power conferred upon that officer, except his function as a member of the board of review provided for by section 14 of the act of 1886. In short, it is a simple taxing law, and was so declared by this court in *In re Kollock* (165 U. S., 526), as to its main and primary purpose.

The argument that the tax is prohibitive of the manufacture and sale of colored oleomargarine is to be considered with reference to the facts about oleomargarine, and on these we again invoke the doctrine of judicial notice and the opinions of this court.

In *Schollenberger* v. *Penna.* (171 U. S., 1) the court discusses the character of oleomargarine, and refers to the reports of the Secretary of the Treasury for the purpose of showing the magnitude of the traffic in that article. Similar in char-

acter to the reports last mentioned, and entitled to the same notice, are the reports of the Twelfth Federal Census, taken in the year 1900. The reports of that census contain statistics which show not only the quantity of butter products and of oleomargarine produced during that year, but also, approximately, the cost and value of the manufactured products. These tables are presumed to contain as accurate information as it is possible to obtain, and to these tables we respectfully call the court's attention.

In volume 9, Manufactures, part 3, on pages 433 to 459, may be found the statistics relating to butter. The following is a summary of the facts there stated respecting the manufacture and cost of butter for the census year of 1900 (p. 437):

Butter made on farms, pounds	1,071,745,127
Butter made in factory creameries, pounds	420,126,546
Butter made in urban dairies, pounds	827,470
Total pounds of butter made	1,492,699,143
Total value of butter made, at 18 cents	$268,685,845

The court will keep in mind the fact that the average value of butter of all grades is fixed at 18 cents per pound. To this fact attention will again be called later on.

On page 435 of the volume is to be found a table (4) showing the number of creameries or butter factories in operation. This table shows that there were in operation in 1900, 5,275 creameries making butter only, and 583 factories making both butter and cheese—a total of 5,858 creameries

engaged in making butter. These creameries were distributed throughout the various States of the United States, as shown by the table, and produced the total of 420,954,016 pounds of butter reported as made in factory creameries and country dairies. On pages 440 and 441 we are given the method of packing, which to a certain extent affects the price, and the average prices received for the product throughout the various States. Thus on page 441 it is stated that the average price received for all butter, as reported by the creameries, was nearly 20.1 cents per pound. The average price for that packed solid, or in tubs, was 19.4 cents; for that packed in rolls, 22.1 cents per pound. The average price received in Connecticut for prints was 24.6 cents; in Massachusetts, 23.5 cents; Pennsylvania, 23.4 cents; in California, rolls, 22.3 cents. The average for butter packed in tubs at Iowa, Minnesota, and Wisconsin creameries was 19 cents; Nebraska, 18 cents, and Kansas, 17 cents. It is this creamery butter that more largely comes into competition with the colored oleomargarine than the butter made on the farm. The average price then on these vast transactions is fixed at 18 cents.

Similar facts as to oleomargarine will be found on pages 517 to 525 of the same volume of the Census Reports. In 1900 there were 24 factories engaged in the manufacture of imitation butter, or oleomargarine; in 1902, 36; and at the present time there are 28, located as follows (the facts

for the periods subsequent to the census tabulation are furnished by the Commissioner of Internal-Revenue from his office records):

States.	Fiscal year ended June 30, 1902.	Present fiscal year, July, 1903.
Colorado	1	1
Rhode Island	5	4
Illinois	10	6
Indiana	3	3
Kansas	3	4
Kentucky	2	0
District of Columbia	1	1
Maryland	1	0
Missouri	1	1
Ohio	4	3
Pennsylvania	1	1
Texas	2	2
New Jersey	2	2
Total	36	28

Upon page 519 of the Census Report, we find this statement:

> The value of the 104,633,214 pounds of oleomargarine (made in 1900) was $12,286,357, an average of 11.7 cents per pound. *This amount represents the value at the factory, packed and ready for shipment, and includes the internal-revenue tax of 2 cents a pound*, which must be paid on withdrawal for sale.

Deducting the internal-revenue tax of 2 cents per pound would give the product a value of 9.7 cents per pound at the factory, which seems to

include, as indicated below, the manufacturers' profit.

On page 518 of the report is to be found the following table, showing the quantity and cost of the materials used in making the product, with the value of the product for that year:

TABLE 3.—*Materials and products: 1900.*

Items.	Quantity.	Cost of materials.	Value of products.
Materials:	*Pounds.*		
Total	114,748,633	87,639,501	
Milk and cream	23,684,395	579,068	
Oleo oil	33,724,621	2,744,235	
Neutral lard	37,651,741	2,976,870	
Cotton-seed oil	11,818,921	567,790	
Butter	396,956	61,176	
Salt	6,962,233	58,887	
Color	204,418	32,078	
Sugar	137,842	7,084	
Glucose	32,965	494	
Stearin and oleo stock	134,541	4,320	
Fuel and rent of power and heat		49,855	
Mill supplies		5,745	
All other materials		501,107	
Freight		50,792	
Products:			
Total	104,633,214		$12,499,81
Oleomargarine	104,633,214		12,286,35
All other products			213,45

It will be noticed that the cost of the materials set out in this table, including fuel, rent, mill supplies, other materials, and freight, is a little less than 7⅓ cents for each pound of oleomargarine

manufactured. The average cost per pound of the different ingredients used in the manufacture of the article was as follows:

	Cents per pound.
Milk and cream, about	2.45
Oleo oil, about	8.20
Neutral lard, about	8.00
Cotton-seed oil, about	4.75
Butter, about	15.50
Salt, about	.85
Color, about	15.50
Sugar, about	5.13
Glucose, about	1.50
Stearin and oleo stock, about	3.21

The court will not fail to observe that the disguises (butter and color) constitute the most expensive ingredients that enter into the composition of oleomargarine.

So, if we add to the average value given oleomargarine in 1900, 9.7 cents, the revenue stamp of 10 cents, it will make a value of 19.7 cents per pound, as against an average value of 18 cents for butter of all kinds, of 20.1 cents for creamery butter packed in prints, and 19.4 cents for creamery butter packed in tubs or packages. And it is this creamery butter, rather than butter made upon the farm, that colored oleomargarine more largely competes with. A large portion of the butter from the farm finds its market in the near-by villages and cities, reaching the consumer through the grocers and small dealers; but naturally much of it also comes in direct competition with the counterfeit article. The creamery product, as a rule,

seeks the larger markets. As the court will notice, the oleomargarine is mostly manufactured at the large cities, with a market close at hand, while the creamery product is manufactured all over the country, farther removed from its market, and consequently is subjected to more expense in reaching it. The apparent fact is that the taxing of the colored article at the rate of 10 cents per pound makes its cost just about equal to the cost of the butter it imitates.

I have just above called attention to the fact that butter was by far the most expensive ingredient used in the manufacture of oleomargarine. To better illustrate the increase in the cost of manufacture by reason of the use of a large percentage of butter, I print herewith the three formulas for the manufacture of oleomargarine, found on page 521 of the volume of the Census Report above quoted from:

Formula 1.—Cheap grade.

	Pounds.
Oleo oil	495
Neutral lard	265
Cotton-seed oil	315
Milk	255
Salt	120
Color	1¼
Total	1,451¼

will produce from 1,265 to 1,300 pounds of oleomargarine.

Formula 2.—Medium high grade.

	Pounds.
Oleo oil	315
Neutral lard	500
Cream	280
Milk	280
Salt	120
Color	1½
Total	1,496½

will produce from 1,050 to 1,080 pounds of oleomargarine.

Formula 3.—high grade.

	Pounds.
Oleo oil	100
Neutral lard	130
Butter	95
Salt	32
Color	½
Total	357½

will produce about 352 pounds of oleomargarine.

"Practically all the oleomargarine manufactured in the United States is made by the simple process of churning a melted mixture of oleo oil and neutral lard with milk, cream, or melted butter to give it the butter flavor, and coloring matter to give it any desired shade of yellow in semblance of butter. In the cheap grades cotton-seed oil is often substituted for a portion of oleo oil and neutral lard, but never to the total exclusion of either. After the churning process the whole is salted and put upon the market in a variety of forms [in respect to shape, packing, etc.], as demanded by the various classes of consumers."

Turning to the records in these cases, what evidence do we find upon the cost of the article and the relative price of butter and oleomargarine in the Chicago market? As the evidence upon this point is practically the same in the *Cliff*, *Schick*, and *Broadwell* cases, it will be sufficient to refer to the evidence in the *Cliff* case.

Dadie, the secretary of the Moxley Company (the company which made the oleomargarine in three cases just named), testified (Cliff R., p. 19) that he knows the company can not make and sell the colored article in competition with butter and pay the 10-cent tax. He says that in December last butter sold for 29 cents per pound, but that was an extremely high price. He said in view of that fact his company was able to manufacture and sell the colored article at 24 cents per pound, 5 cents below the price of butter. This doubtless was at a fair profit to the manufacturer. He further states that the average price for butter the year around is approximately 25 cents per pound. On page 20 he states that in January of the present year they were selling the uncolored oleomargarine at 12½ cents per pound, and, it is to be presumed, at a fair profit.

On cross-examination, Izard, a restaurant keeper and a witness for the dealers, testified (R., p. 18) that he could not now get good butter cheaper than he could get colored oleomargarine; that good butter cost on an average about 2 cents more per pound

than colored oleomargarine. In view of the testimony of the dealers' own witnesses respecting the relative cost of butter and of oleomargarine, and of the facts contained in the Census Report quoted from, it can not be contended, with any force or reality, that the tax is prohibitive of the sale of the counterfeit article. An analysis of Dadie's testimony (*ut supra*) shows by the clearest inferences that the tax has simply caused a readjustment of demand and markets; that the oleomargarine business is not destroyed; and that already, after the check caused by the tax, the industry and trade in the uncolored article are being reestablished and are growing. It may be true that the articles used in the manufacture of oleomargarine have increased in cost; but so has butter correspondingly, so that the relative cost appears to remain the same.

It is claimed that the tax is prohibitive because the quantity of the colored article sold since the taking effect of the present law has fallen off so that but comparatively small quantities have been sold. That does not prove the claim. The testimony of the witnesses for the dealers is that good butter costs on an average 2 cents more per pound than colored oleomargarine.

This fact alone shows a normal margin of profit and a sufficient field for oleomargarine in competition with butter, even under the present tax. Now, why is it that, since oleomargarine is claimed to be at least as sweet, pure, and wholesome as

butter, and can be sold under present conditions in competition with butter, the people who are said to wish it, or even prefer it, are not now willing to buy it at 2 cents per pound less than butter, when they were willing, as claimed, under the 2-cent tax, to pay butter prices for it? This seems rather strange, and yet is what the dealers' claim and testimony reduces to. Is the apparent dilemma explained by regarding the distinction between the small dealers or users (like hotel people) on the one hand and the actual *consumer* on the other? The latter probably seldom knew what he was buying and eating, and it may be that one effect of this act is to protect him, to enable him to know more certainly what he is buying, and in that way affect the undue profits and, in consequence, the market demand.

The witness Dadie says (Schick Rec., p. 17, 18) that the uncolored article put out by them is now sold to the poorer people and, so far as he can ascertain, it is displacing lard and is used for cooking purposes. He further says (p. 18) that lard was selling for 10¼ cents per pound and uncolored oleomargarine at 12½ cents, and that the people were buying the latter for cooking in preference to lard. It is strange that people will pay more for this superior article for cooking purposes than for lard, and yet while formerly preferring it to butter and paying butter prices, they will not purchase it now although it can be had at a less price than butter.

What effect did the law have upon the production of oleomargarine? For the year ending June 30, 1902, the total production of oleomargarine was 123,133,853 pounds. For the year ending June 30, 1903 (under the present law), the total production amounted to 71,237,438 pounds. Of this amount 5,112 pounds paid the tax under the old law at 2 cents per pound; 2,719,422 pounds (colored) paid the tax of 10 cents; 68,490,992 pounds paid the tax of one-fourth cent, and 21,915 pounds (imported) paid the tax of 15 cents. This information is taken from the reports of the Commissioner of Internal Revenue for these years. It is true that there is a large falling off in production. A part of the loss may properly be attributable to the time required to adjust matters to new conditions.

The following table shows the number of pounds produced during the months of July, August, and September of the present year, as appears from the records in the office of the Commissioner of Internal Revenue:

1903.	Uncolored.	Colored.
July	3,268,805	284,828
August	3,502,618	285,581
September	4,268,993	281,053
Total	11,040,416	851,462

Although this information was furnished informally, there can be no valid objection to its relevancy or accuracy.

Can it be said, with any degree of certainty, what per cent of this loss was a loss of legitimate trade and business? It must be remembered that prior to the change in the tax practically all oleomargarine was colored yellow. (Dadie, Cliff R., p. 17.) Now, in view of the fact that at the time of the passage of this law about thirty of the States had absolutely prohibited the manufacture and sale of oleomargarine colored in imitation of butter; the fact that nearly all of the remaining States had stringent laws requiring the branding of both the colored and the uncolored article; the fact (as shown by the decisions of the courts of the several States and the reports of the officers charged with the enforcement of State laws) that great frauds were being perpetrated in selling the colored product as and for butter; and the further fact that by the passage of this law and the promulgation of the regulations thereunder, it became exceedingly difficult to continue these frauds without detection, is it not a reasonable presumption that the falling off in production, the alleged injury to the business, is indicative of the amount of the colored article that theretofore had been fraudulently sold as and for butter? If the effect of this law be to put a stop to the practice of these frauds, can offending parties for that reason alone come into this court and be heard to complain? I do not say defendants have so offended, but the business in general has been long open to suspicion. And if offenders can not complain that

the fraudulent side of the business has been checked as one of the results of the tax, what right granted by the Constitution of the United States has been impaired? The right to practice a fraud upon one's fellow men! Very likely innocent manufacturers and dealers suffer. But this court said in the *Plumley case* that "the Constitution of the United States does not secure to anyone the privilege of defrauding the public." Is it too much to add that the Constitution does not secure the opportunity to defraud nor intend to leave an open door to fraud which he may enter who is so inclined? I venture to say that in the end the honest side of the trade, in its proper development, will approve the effect of this law as limiting the opportunities for fraud, in harmony with and not counter to the great current of State policy and legislation.

These cases arose in the States of Illinois and Ohio. What rights, privileges, or immunities guaranteed by those States have been infringed? None whatever. On the contrary, the acts of these parties were, at the time of their commission, made criminal by the laws of the States in which they were committed. The act of Illinois of June 14, 1897, in force at the time of the commission of the offenses here involved, reads as follows:

> Every article made from other than pure milk or cream is declared to be imitation butter.

> No person shall coat, powder, or color with annatto, or any coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product so colored or compounded shall be made to resemble butter, or the product of the dairy.
>
> No person shall combine any animal fat or vegetable oil or other substance with butter or combined therewith or with animal fat or vegetable oil, or combination of the two, or with either one, any other substance or substances for the purpose or with the effect of imparting thereto a yellow color or any shade of yellow so that such substitute shall resemble yellow, or any shade of genuine yellow butter, nor introduce any such coloring matter or such substance or substances into any of the articles of which the same is composed. (Laws of 1897, p. 3.)

The act further makes it unlawful to produce or manufacture, or sell, prepare for sale, or offer for sale, any imitation butter made in violation of the act, whether produced in the State or not, and imposes a heavy penalty for any violation thereof.

The Ohio law, in force since 1894, provides as follows:

> No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methyl orange, butter yellow, annatto, analine dye, or any other coloring matter. (Act of May 16, 1894; 91 Ohio Laws, 274.)

In *State ex rel.* v. *Capital City Dairy Co.* (62 Ohio St., 350), arising under the State law just quoted, practically the same complaint was made by an oleomargarine manufacturer that is made here—the denial of an alleged natural right to manufacture the article and to sell it in such form as it chose.

The proceeding was one in *quo warranto* to revoke the charter of the corporation for the repeated violation of the law above quoted. The court, after saying (p. 359) that the evidence compelled the conclusion that the acts charged had been committed by the defendant, and that their frequency warranted the conclusion that they were committed willfully and with the intent to disregard the statute and to defy the officers whose duty it was to enforce the law, held that the law did not violate any right granted to the manufacturer by the constitution of that State; further stating that the difference between the price at which butter may be manufactured and sold and that at which oleomargarine may be afforded, is so large that the temptation to impose upon the public is too great to be resisted; and that, therefore, because of the manufacture of the article in a way calculated to deceive and to impose a fraud upon the public, the State had the right to pass the law in question. So there is nothing in their claim that, in imposing this tax, Congress is denying or interfering with a right granted them by the constitutions and laws of their respective

States. *The Capital City Dairy* case reached this court, and the decision of the supreme court of Ohio was sustained (183 U. S., 238).

In other words, since we have entered upon the underlying considerations, and frankly discussed the collateral effect of this tax as imposing a restriction, but not an undue restriction, upon business, it is proper to say, and it is manifest, that on the side of alleged interference with State powers, the Federal act is not in conflict, but on the other hand operates, so far as it operates outside the revenue field, to reinforce and support the trend of State legislation.

To return to the question whether the tax is prohibitive—if there be a legitimate demand for the colored article as and for what it really is, does the mere fact that the tax imposed requires the article to be sold at a price equal to that at which butter is sold, render the tax prohibitive? Will not the public generally, if they desire the article, pay the price asked for it, especially when the increase in price from the price under the former law is so trifling? To say that the public will not do this is to concede that the article can not stand upon its merits, but must be sold, and fraudulently sold, in the disguise of and as and for butter.

For, when there is a real public demand for an article, uncontrolled by inducements and irrespective of guises and pretense, the public will have it, and the question of cost or tax cuts but little figure.

Thus it costs but a few cents per gallon to manufacture whisky. Upon that article the Government imposes a tax of $1.10 per gallon; but because of that fact does the tax render its manufacture prohibitive? Certainly not. On the contrary there is a strong demand for it, because the public demands whisky. So, too, with tobacco; Congress in the act of 1898 increased the tax from 6 to 12 cents per pound, but the demand for it did not diminish. So with beer, and many other articles. We import many articles, upon which heavy duties are imposed, which we manufacture at a less cost than the imported article can be sold for; but while that may check the sale of the article, it does not thereby cause the duty to be regarded as prohibitive. Some of the compound taxes on foreign imports amount to 100 per cent or more.

(5) Further on the validity of the classification; proper substitutes, and improper imitations.

An article may be used as a substitute for another without being made so closely in imitation of it that it is not possible to tell the original from the substitute. And what is the purpose of the close imitation? The natural inference is that the intention is to dispose of it as being that which it seeks to imitate. And, as a matter of fact, is it not the purpose in coloring oleomargarine to make it so closely resemble butter that it may be sold as and for butter? This fact is so fully within common knowledge that the court may properly take

judicial notice of it. In considering State laws, the court has already done so. Will the claim put forth that the public demands the colored article and will not use the uncolored bear examination? Can that possibly be true of the vast majority of actual consumers?

A good illustration of the difference between a substitute for an article and an imitation of it exists with respect to coffee. There is upon the market to-day a substitute for coffee, made of cereals, put up in a distinctive form, which, when prepared, looks like and tastes like coffee. This article is sold upon its merits, and irrespective of the price for which the real coffee is sold. To the extent that its use diminishes the use of the real coffee it may be said to come in competition with it. While it is a substitute for, it can not strictly be said that it is an imitation of coffee. No one can be deceived into buying it for coffee.

There is also upon the market to-day an imitation coffee, made of parched peas, chicory, beans, molasses, and a few other kindred products. This composition is ground, mixed, and pressed into molds, so that when it reappears it comes forth in the semblance of and is a good counterfeit of the real coffee berry. That is an imitation coffee. The result, if not the purpose, of imitating the berry of the real article is obviously the same as in coloring oleomargarine—it may deceive the public—or, as was said by Mr. Justice Harlan in

Plumley v. *Massachusetts*, it may *cheat* the general public into purchasing that which they may not intend to buy.

Now suppose that Congress should pass a law imposing a tax of 10 cents per pound upon such "coffee" when made in imitation of the real berry, and one-fourth cent per pound when made in the form of a round berry; and suppose the law were contested on the ground that the tax of 10 cents was prohibitive; and the manufacturer were to claim he could not sell the coffee in the round berry because the public demanded the coffee in the form of the real article, saying to him, "take back your parched peas, we will not have them" (as in the Cliff case, Rec., p. 14); "we are willing to pay coffee prices for the article when put up in the form of the real article, but otherwise we will not use it." Would that claim be believed; or is there a sentimental difference because butter or oleomargarine appears on the table and coffee or its imitation is ground up to make an indistinguishable liquid? So we say, that if colored oleomargarine has the peculiar standing as a legitimate article of commerce, which is claimed for it by the dealers, the mere fact of the imposition of the tax would only reduce, in slight degree, the demand for the article.

On the other hand, does not the fact that the present law and the regulations under it make it next to impossible to continue the business on its

counterfeiting and illegitimate side, furnish us the true solution of the reason for the falling off in the sales of colored oleomargarine? If one of the incidents and effects of the law be to check fraud, I am confident this court will not be diligent to find reasons antagonistic to its well-settled judgments for sustaining the complaint that the law is void.

Counsel for *McCray* attempts to show (brief, p. 12) that this tax was not a revenue measure, because at the time the tax was changed we had an overflowing treasury and Congress was then engaged in reducing the war taxes. It is true that Congress was taking the burdens off of a great number of articles and readjusting taxes, having due regard for the general welfare of the people. But the tax upon oleomargarine was imposed in 1886, and was not therefore a war-revenue tax. And further, Congress did reduce the tax upon oleomargarine from 2 cents to one-fourth cent per pound when put up in such form as to show its true character; but having regard to the great profits then made in selling colored oleomargarine, it shifted the burden of the tax to that form of the article and increased it. This Congress, applying its judgment and discretion to the whole field and the different elements involved, had a perfect right to do. The law was none the less a revenue measure because of the extent of the field and the bearing of the various elements included.

(6) The oleomargarine involved in each of these cases was artificially colored within the meaning of section 8.

Section 8, as amended May 9, 1902, after laying a tax of 10 cents per pound upon oleomargarine, limited the operation of this tax by providing:

> When oleomargarine *is free from artificial coloration* that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.

The question here to be determined is, What constitutes an artificial coloration of oleomargarine within the meaning of this proviso?

In the *Schick* and *Broadwell* cases it is conceded by the witnesses for the dealers that the oleomargarine, which formed the basis of the prosecutions in those cases, was artificially colored by the use of the Wells-Richardson Improved Butter Color, and hence those cases may be dismissed from further discussion under this proposition.

In the *McCray* case the coloring was imparted by using butter which had been colored with the Wells-Richardson Butter Color.

In the *Cliff* case the coloring was produced through the use of palm oil in the manufacture of the oleomargarine.

Now, it is contended in the *McCray* case that the use of butter, artificially colored, in the manufacture of the oleomargarine, did not constitute an artificial coloration within the meaning of the statute. This contention barely merits notice.

The Government concedes that the manufacturer may use any healthful ingredient which in itself is of a yellow color, if it can be used as an ingredient in appreciable quantity, and that such use of an ingredient does not constitute an artificial coloration within the meaning of the statute; but the Government denies that a manufacturer may use an article in so minute a quantity as to constitute no material part of the article when the direct effect of the use of such ingredient is artificially to color the oleomargarine a shade of yellow. That can not be done indirectly which can not be done directly. It is asserted (in the McCray brief, pp. 30–35) that a person may use artificially colored butter in the manufacture of oleomargarine and not subject the article to the 10-cent tax. The contention is that since section 2 of the act of 1886, in defining what shall constitute oleomargarine, includes butter when mixed with other substances, that thereby Congress has recognized butter as a proper ingredient of oleomargarine, and since by section 1 of that act Congress defined butter to be the food product usually known as butter, made exclusively from milk or cream, with or without salt and with or without additional coloring matter, that thereby any butter, whether artificially colored or not, may be used in the manufacture of oleomargarine, and the color thereby introduced does not constitute artificial coloration within the meaning of the statute.

Now to the logician this may be a specious argument; but the difficulty is that after the logical excursion he lands at his starting point. If all butter were, under the definition contained in section 1, *required* to be artificially colored, there might be some force in his argument. But Congress therein recognizes two kinds of butter—the colored and the uncolored; and so, in order to escape the 10-cent tax, oleomargarine manufacturers must use the uncolored variety of butter. Even if all butter were artificially colored, the necessary effect of the law would be that all oleomargarine containing butter would be subject to the 10-cent tax. To exempt the oleomargarine from the 10-cent tax *it must be free from artificial coloration;* that is, at no stage of the manufacture can artificial coloration be introduced into compound, whether directly or indirectly or by means of the use of butter containing the artificial coloring matter. The fact that the color was introduced through the use of artificially colored butter makes it none the less artificial coloration, and requires the payment of tax accordingly.

Nor does the amendment to section 2 made by the act of May 9, 1902, change this conclusion. That amendment provides:

> And any person that sells, vends, or furnished oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any

> artificial coloration, * * * shall also be held to be a manufacturer of oleomargarine, etc.

The only purpose of this provision was to prevent the coloration of the article after it left the factory. But for this provision there would have been nothing to prevent the coloration of the product after that point of time. The manufacturers, in order to escape the tax of 10 cents, could have shipped to the dealers, wholesale and retail, the article in its uncolored state, leaving it to them to do the coloring. If that loophole had been left open, obvious additional requirements of inspection to prevent fraud and evasion would have been called for.

(7) As to coloration by means of palm oil.

In the *Cliff* case the coloration was produced by using palm oil (Rec., p. 10). The formula used in the manufacture of the article sold, as testified by the foreman of the factory at which it was made, is as follows:

> Three pounds of oleo oil; 1 pound and 12 ounces of neutral lard; 2 pounds of cottonseed oil; 1 pound and 14½ ounces of milk; 1 pound and 4 ounces of salt; and 1½ ounces of palm oil; a total of 10 pounds.

The court will observe that of the 160 ounces required to make up the proportions of the formula, but 1½ ounces was palm oil, less than 1 per cent of the entire amount.

What is palm oil, and what was the purpose of its use in this formula? For a full description of its properties and uses we refer the court to Lewkowitsch's "Chemical Analysis of Oils, Fats, and Waxes" (2d ed.), page 517, and to Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161, both standard works on chemistry.

These chemists (authors) say that palm oil is the product, mainly, of the fruit of two species of palm trees; that in color it varies greatly, ranging through all shades from orange yellow to dark dirty red; in consistency, from soft lard to that of hardest tallow; that when fresh it has a somewhat sweetish taste, but on becoming older it has a rancid and a more or less disagreeable smell; in its fresh state the proportion of fatty acids, calculated as palmitic acid, amounts to 12 per cent, and may in older samples reach 100 per cent; frequently it contains from 50 to 70 per cent of free palmitic acid, and that it is chiefly used in the manufacture of soap, candles, and axle grease.

Moxley, the manufacturer of this oleomargarine, in June, 1902, submitted to the Commissioner of Internal Revenue, for analysis, a sample of *crude palm oil*. After examination and analysis the Commissioner (Rec., p. 9) replied that "the oil was rancid, of bad taste and smell, and that it was considered by this office wholly unfit for use in oleomargarine." Thereupon Moxley submitted a sample of what he termed "refined palm oil." As

to this sample, the Commissioner, after stating that it had been examined and chemically analyzed, says:

> It was found to contain a large amount of free fatty acid; it was by no means free from disagreeable odor and taste, and was of a very deep red or orange color. If oil like the sample were used in any considerable quantity as one of the fatty ingredients, it would undoubtedly cause a condition under which this office would rule that the oleomargarine contained an ingredient deleterious to public health and offensive in taste and odor.

And the Commissioner then continues:

> After this second sample had been submitted and the matter was under advisement in this office, fullest opportunity was given for hearing and oral argument by you and others interested upon the subject of the use of palm oil in the manufacture of oleomargarine. As a result of the examination made of the samples of oil submitted, *it was virtually agreed at the hearing that palm oil* of the grade of the samples examined *could not be introduced* into the manufacture of oleomargarine in considerable quantities as oleo oil, neutral oil, cottonseed oil, butter, or milk is now introduced, *but only in quite small quantities or proportions.* It was further found by examination in this office that, take any given quantity of unartificially colored oleomargarine—the same being virtually white in appearance—if three-tenths of 1 per cent of the palm oil submitted was introduced therein it would give to the finished product a shade of yellow, and that the finished product would in appearance be in imitation or semblance of butter. In other words, that if to the finished sum total of uncolored oleomargarine in weight 1,500 pounds there was added a little less than 5 pounds of this palm oil, the result would be a marked change in color, there being secured through the introduction of the palm oil to the finished product a shade of yellow, causing the finished product to look like butter.

And this is the conclusion of the Commissioner:

> This office rules that where so minute and infinitesimal a quantity of a vegetable oil is used in the manufacture of oleomargarine as is proposed to be used of palm oil, and through its use the finished product looks like butter of any shade of yellow, it can not be considered that the oil is used with the purpose or intention of being a *bona fide* constituent part or element of the product, but is used *solely* for the purpose of producing or imparting a yellow color to the oleomargarine, and, therefore, that the oleomargarine so colored is not free from artificial coloration and becomes subject to the tax of 10 cents per pound.

There can be no doubt that the use of palm oil is for artificial coloration. Indeed, any other use would make the product unfit for consumption.

Cliff's witnesses testified as follows upon this point: Hoskins, a chemist, says (Rec., p. 11) that he is familiar with the chemical properties of palm oil; that "it is an edible oil;" and in his opinion "there is nothing deleterious or unwholesome in the use of palm oil, *in the proportion in which it is used in this formula*. That language implies that if it had been used in larger quantities it would have been deleterious to health, as stated by the Commissioner, which is the fact.

On cross-examination he says that a very small proportion of palm oil is necessary to produce a *desirable* color in oleomargarine; that in color it is a reddish yellow.

It plainly appears from the testimony, and by reference to the chemical works cited, that but minute quantities of the oil can be used in the manufacture of oleomargarine; if an appreciable quantity were used, the product would become a dirty red, having no resemblance to butter, and therefore undesirable; if bleached by exposure to air, while losing its color, it will still retain its odor and its large percentage of acids, and becomes rancid, and therefore disagreeable and deleterious; if bleached chemically, it loses both odor and color, and is therefore undesirable for the manufacturer who is seeking the color properties.

The record contains testimony with respect to the use by Moxley of color prior to the taking effect of the present law. On page 20 of the *Cliff* record, his secretary, Dadie, testifies that prior to

July 1, 1902, they used only the Wells-Richardson butter color; since then they have used some of that color *and also some palm oil*. It seems that the manufacturer discovered that palm oil was a wholesome and desirable *ingredient* for use in making oleomargarine immediately after the new law went into effect.

It may be well to repeat here the formulas used in manufacturing the oleomargarine involved in each of these cases:

> *McCray case:* Oleo oil, 20 pounds; neutral lard, 30 pounds; creamery butter 50 pounds; milk and cream, 30 pounds; salt, 7 pounds—137 pounds.

No coloring matter is given for the reason that the butter used contained artificial coloring.

> *Schick case:* Oleo oil, 40 ounces; neutral lard, 71¾ ounces; cream, 28 ounces; salt, 20 ounces; butter color, one-fourth ounce.
>
> *Broadwell case:* Oleo oil, 40 ounces; neutral lard, 71¾ ounces; cream, 28 ounces; salt, 20 ounces; butter color, one-fourth ounce.
>
> *Cliff case:* Oleo oil, 48 ounces; neutral lard, 28 ounces; cotton-seed oil, 32 ounces; milk, 30½ ounces; salt, 20 ounces; *palm oil*, 1½ *ounces*.

Looking at the relative quantities of the different ingredients named in these formulas, to which class would an observant person say palm oil belonged—to the butter fats or to the coloring elements? To put this question is to answer it. The

fact that palm oil is a vegetable oil makes it none the less a vegetable coloring matter. If a wholesome vegetable fat, which the evidence shows it is not, it would not be used in such minute quantities. No one will deny the fact that the more cream or butter used in the manufacture of oleomargarine, the better its quality; it is the one indispensable ingredient in its manufacture, imparting the flavor and the odor, exclusively adding the butyrin elements, which no other fat and no product of manufacturing chemistry can imitate, without which no one would dream of using oleomargarine as a butter; for with all his skill, the chemist can not yet compete with the delicate chemistry of the cow.

(8) May the plaintiffs in error attack the validity of the provision of section 14 conferring finality of decision upon the Commissioner of Internal Revenue?

The Government suggests the point that plaintiffs in error are not in a position to question the validity of the provision of section 14 conferring upon the Commissioner of Internal Revenue the power finally to decide what mixtures are subject to tax under the act.

Certainly *Schick* and *Broadwell* can not, for by the testimony of their own witnesses it is conceded the Wells-Richardson artificial coloration was used. How can they be heard to deny the validity of the power to decide a disputed point when it was not exercised against them?

Is *McCray* in any better position? He admits in his answer that his product contained the Wells-Richardson artifical coloration, but says that because it was introduced through the use of butter containing the coloration it was not *artificial* coloration. Having admitted the coloration was there, it matters not how it came there; his product was not free from artificial coloration.

And in the *Cliff* case, even conceding for argument's sake the invalidity of that provision, it will not avail *Cliff*, for by the testimony of his witnesses the court must hold that the palm oil was introduced for purposes of coloration and not for its fat, and that therefore the article was artificially colored.

(9) The trial court rightfully excluded the testimony for the defendants.

If the court shall hold the law attacked to be valid, then the question whether the trial court properly or improperly excluded the testimony offered on behalf of the defendants, to the exclusion of which exceptions were taken, becomes immaterial. For this reason a discussion of these assignments of error is not deemed necessary.

The Government respectfully submits that the law is valid in all respects and that the judgments in each of these cases should be affirmed.

HENRY M. HOYT,
Solicitor-General.

APPENDIX A.

(Act of August 2, 1886, 24 Stat. 209, as amended by act of May 9, 1902, 32 Stat., 193, the amendments made by latter act being printed in black type.)

Chapter 840. An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter.

SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance

of butter, or when so made, calculated or intended to be sold as butter or for butter.

SEC. 3. That special taxes are imposed as follows:

Manufacturers of oleomargarine shall pay six hundred dollars. Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine.

And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any artificial coloration that causes it to look like butter of any shade of yellow, shall also be held to be a manufacturer of oleomargarine within the meaning of said act, and subject to the provisions thereof.

Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine. But any manufacturer of oleomargarine who has given the required bond and paid the required special tax, and who sells only oleomargarine of his own production, at the place of manufacture, in the original packages to which the tax-paid stamps are affixed, shall not be required to pay the special tax of a wholesale dealer in oleomargarine on account of such sales.

Retail dealers in oleomargarine shall pay forty-eight dollars. Every person who sells oleomargarine in less quantities than ten pounds at one time shall be regarded as a retail dealer in oleomargarine. And sections thirty-two hundred and thirty-two, thirty-two hundred and thirty-three, thirty-two hundred and thirty-four, thirty-two hundred

and thirty-five, thirty-two hundred and thirty-six, thirty-two hundred and thirty-seven, thirty-two hundred and thirty-eight, thirty-two hundred and thirty-nine, thirty-two hundred and forty, thirty-two hundred and forty-one, and thirty-two hundred and forty-three of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section, and to the persons upon whom they are imposed: *Provided*, That in case any manufacturer of oleomargarine commences business subsequent to the thirtieth day of June in any year, the special tax shall be reckoned from the first day of July in that year, and shall be five hundred dollars.

Provided further, That wholesale dealers who vend no other oleomargarine or butterine except that upon which a tax of one-fourth of one per cent per pound is imposed by this act, as amended, shall pay two hundred dollars; and such retail dealers as vend no other oleomargarine or butterine except that upon which is imposed by this act, as amended, a tax of one-fourth of one cent per pound shall pay six dollars.

SEC. 4. That every person who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than one thousand and not more than five thousand dollars; and every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars; and every person who

carries on the business of a retail dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than fifty nor more than five hundred dollars for each and every offense.

SEC. 5. That every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds; shall keep such books and render such returns of material and products; shall put up such signs and affix such number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue, and in a penal sum of not less than five thousand dollars; and the sum of said bond may be increased from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue.

SEC. 6. That all oleomargarine shall be packed by the manufacturer thereof in firkins, tubs, or other wooden packages not before used for that purpose, each containing not less than ten pounds, and marked, stamped, and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine shall be in original stamped packages. Retail

dealers in oleomargarine must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable wooden or paper packages, which shall be marked and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe. Every person who knowingly sells or offers for sale, or delivers or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offence not more than one thousand dollars, and be imprisoned not more than two years.

SEC. 7. That every manufacturer of oleomargarine shall securely affix, by pasting, on each package containing oleomargarine manufactured by him a label on which shall be printed, besides the number of the manufactory and the district and State in which it is situated, these words: "Notice.—The manufacturer of the oleomargarine herein contained has complied with all the requirements of law. Every person is cautioned not to use either this package again or the stamp thereon again, nor to remove the contents of this package without destroying said stamp, under the penalty provided by law in such cases." Every manufacturer of oleomargarine who neglects to affix such label to any package containing oleomargarine made by him, or sold or offered for sale by or for him, and every person who removes any such

label so affixed from any such package, shall be fined fifty dollars for each package in respect to which such offense is committed.

Sec. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: Provided, when oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow, said tax shall be one-fourth of one cent per pound.

The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

SEC. 9. That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal.

SEC. 10. That all oleomargarine imported from foreign countries shall, in addition to any import duty imposed on the same, pay an internal-revenue

tax of fifteen cents per pound, such tax to be represented by coupon stamps, as in the case of oleomargarine manufactered in the United States. The stamps shall be affixed and canceled by the owner or importer of the oleomargarine while it is in the custody of the proper custom-house officers; and the oleomargarine shall not pass out of the custody of said officers until the stamps have been so affixed and canceled, but shall be put up in wooden packages, each containing not less than ten pounds, as prescribed in this act for oleomargarine manufactured in the United States, before the stamps are affixed; and the owner or importer of such oleomargarine shall be liable to all the penal provisions of this act prescribed for manufacturers of oleomargarine manufactured in the United States. Whenever it is necessary to take any oleomargarine so imported to any place other than the public stores of the United States for the purpose of affixing and canceling such stamps, the collector of customs of the port where such oleomargarine is entered shall designate a bonded warehouse to which it shall be taken, under the control of such customs officer as such collector may direct; and every officer of customs who permits any such oleomargarine to pass out of his custody or control without compliance by the owner or importer thereof with the provisions of this section relating thereto, shall be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than three years. Every person who sells or offers for sale any imported oleomargarine, or oleomargarine

purporting or claimed to have been imported, not put up in packages and stamped as provided by this act, shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years.

SEC. 11. That every person who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.

SEC. 12. That every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars, and to a forfeiture of all articles so purchased or received, or of the full value thereof.

SEC. 13. That whenever any stamped package containing oleomargarine is emptied, it shall be the duty of the person in whose hands the same is to destroy utterly the stamps thereon; and any person who willfully neglects or refuses so to do shall for each such offense be fined not exceeding fifty dollars and imprisoned not less than ten days nor more than six months. And any person who fraudulently gives away or accepts from another, or who sells, buys, or uses for packing oleomargarine, any such stamped package, shall for each such offense be fined not exceeding one hundred dollars and be imprisoned not more than one year. Any revenue officer may destroy any emptied oleomargarine package upon which the tax-paid stamp is found.

SEC. 14. That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases, are to be taxed under this act; and his decision in matters of taxation under this act shall be final. The Commissioner may also decide whether any substance made in imitation or semblance of butter, and intended for human consumption, contains ingredients deleterious to the public health; but in case of doubt or contest his decisions in this class of cases may be appealed from to a board hereby constituted for the purpose, and composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture; and the decisions of this board shall be final in the premises.

SEC. 15. That all packages of oleomargarine subject to tax under this act that shall be found without stamps or marks as herein provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States.

Any person who shall willfully remove or deface the stamps, marks, or brands on package containing oleomargarine taxed as provided herein shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars, and by imprisonment for not less than thirty days nor more than six months.

SEC. 16. That oleomargarine may be removed from the place of manufacture for export to a foreign country without payment of tax or affixing stamps thereto, under such regulations and the filing of such bonds and other security as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe. Every person who shall export oleomargarine shall brand upon every tub, firkin, or other package containing such article the word "oleomargarine," in plain Roman letters not less than one-half inch square.

SEC. 17. That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

SEC. 18. That if any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

SEC. 19. That all fines, penalties, and forfeitures imposed by this act may be recovered in any court of competent jurisdiction.

SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

SEC. 21. That this act shall go into effect on the ninetieth day after its passage; and all wooden packages containing ten or more pounds of oleomargarine found on the premises of any dealer on or after the ninetieth day succeeding the date of the passage of this act shall be deemed to be taxable under section eight of this act, and shall be taxed, and shall have affixed thereto the stamps, marks, and brands required by this act or by regulations made pursuant to this act; and for the purposes of securing the affixing of the stamps, marks, and brands required by this act, the oleomargarine shall be regarded as having been manufactured and sold, or removed from the manufactory

for consumption or use, on or after the day this act takes effect; and such stock on hand at the time of the taking effect of this act may be stamped, marked, and branded under special regulations of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury; and the Commissioner of Internal Revenue may authorize the holder of such packages to mark and brand the same and to affix thereto the proper tax-paid stamps.

Approved, August 2, 1886.

[Act of May 9, 1902, 32 Stat., 197.]

Sec. 6. Wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal-revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months.

APPENDIX B.

STATE AND TERRITORIAL LAWS RELATING TO OLEOMARGARINE, ADULTERATED BUTTER, RENOVATED BUTTER, AND FILLED CHEESE.

ALABAMA.

Code of 1896: Section 5326 prohibits the manufacture or sale of oleomargarine except in such manner as will advise the consumer of its real character, *free from coloration or ingredients that cause it to look like butter*, by having it stamped with its true name. It is a misdemeanor for proprietors of hotels, boarding houses, restaurants, etc., to serve to guests any composition made wholly or partly out of fat, oil, or oleaginous substance which shall be in imitation of yellow butter.

ALASKA.

General food laws: Section 156 relates to the sale of unwholesome provisions; section 157 to injurious adulterations; section 84 to trade-marks, etc. (Carter's Annotated Code, 1900, part 1, pages 18 and 33.)

(Alaska has no officer authorized to enforce its food laws.)

ARIZONA.

Sections 348 and 349, Criminal Statutes: The law of this State prescribes that every package containing oleomargarine shall be conspicuously branded with the word "oleomargarine," and

requires retail dealers of said product to deliver to each customer purchasing same a printed label bearing the word "oleomargarine," printed in type each letter of which shall not be less than one-fourth of an inch square. The law further requires that proprietors of hotels, restaurants, and other places where meals are furnished for pay, shall inform their patrons (if inquiry is made) that they use oleomargarine or imitation butter, if such be the case.

ARKANSAS.

Act of March 31, 1885: Section 1586 requires that any person who shall sell any article, substance, or compound made in imitation or semblance of butter, or a substitute for butter, and not made wholly of milk or cream, shall brand same with the words "adulterated butter;" or, if such substitute is a compound known as "oleomargarine" or "butterine," the words "oleomarine" or "butterine" shall be legibly branded or stamped thereon. A penalty is provided for violation of this section.

Section 1585 requires that keepers of hotels, inns, restaurants, and boarding houses who shall serve oleomargarine, adulterated butter, or renovated butter to guests shall have the dish in which the butter substitute is placed plainly marked with the words "oleomargarine," "butterine," or "adulterated butter," as will correctly describe the article.

CALIFORNIA.

Act approved March 4, 1897: This act permits the sale of imitation butter or imitation cheese made wholly or partly from oil, fat, or oleaginous

substance, if put up in distinct and separate form, and in such manner as will advise the consumer of their real character, *free from coloration or ingredients that cause them to look like butter* or cheese. Each package containing such products must be legibly and durably stamped or branded with the words "substitute for butter" or "substitute for cheese." It is a misdemeanor to serve to inmates of penal or charitable institutions, receiving assistance from the State, imitation products. Hotels, restaurants, etc., serving such products must inform their guests of that fact by means of a printed placard.

Act of February 23, 1899, defines renovated butter, and requires it to be put up in separate and distinct form, and each roll must be marked with the words "process butter" or "renovated butter."

CONNECTICUT.

Section 2558 provides that no person shall sell, offer, or expose for sale, or take orders for the future delivery of or have in his possession with intent to sell, any article not produced from unadulterated milk or cream, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream, but does not prohibit the manufacture or sale of oleomargarine in a separate and distinct form in such manner as will advise customers of its real character *when free from coloration and from any ingredient that causes it to look like butter*.

Act approved May 18, 1895, prescribes that no imitation butter shall be sold unless there is a plain sign at the outer main entrance of the establishment bearing the words "sold here," preceded by

the name of the imitation article. All oleomargarine must be kept in packages appropriately marked with the name of contents, and the seller must orally inform each buyer that the substance is not butter, and must give the buyer the name of the imitation article. Any article resembling butter and not made wholly from the milk of cows is defined to be imitation butter.

Bakers, etc., using, in the preparation of food for sale, oleomargarine, must inform buyers thereof of the use of such product by means of a sign. Hotels, boarding houses, and restaurants serving oleomargarine to guests shall so inform them by means of a sign bearing the words "oleomargarine used here."

COLORADO.

Act approved April 1, 1895: Section 4 prohibits the manufacture and sale of oleomargarine or filled cheese except in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredients that will cause it to look like cheese or yellow butter.*

DISTRICT OF COLUMBIA.

AN ACT to prevent the manufacture or sale of adulterated food or drugs in the District of Columbia, approved October 12, 1888.

This act was practically repealed by the act relating to the adulteration of foods and drugs in the District of Columbia, approved February 17, 1898.

Section 1 of the act of February 17, 1898, provides that no person or agent shall, within the District of Columbia, sell, offer for sale, or exchange any article of food which is adulterated.

Section 10 provides that nothing in this act contained shall be construed as modifying or repealing any of the provisions of "An act defining butter, imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," approved August 2, 1886; or of "An act defining cheese, and also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of 'filled cheese,'" approved June 6, 1896.

DELAWARE.

Section 1, act approved March 9, 1901, provides that when any person exposes for sale in the State of Delaware oleomargarine, butterine, or any similar substance made in imitation or semblance of pure butter, such person shall have conspicuously placed upon the tub, package, or parcel thereof a placard containing the words "oleomargarine," "butterine," or whatever the name of the contents of the package may be, printed thereon in plain, uncondensed gothic letters not less than 1 inch long.

FLORIDA.

Revised Statutes of 1892, section 2662: The laws of Florida make it a misdemeanor to knowingly sell or cause to be sold as butter any spurious preparations purporting to be butter, whether known as "oleomargarine" or by any other name, and imposes a penalty upon hotels or boarding houses who serve to guests spurious butter without giving notice of the use of such "imitation butter."

GEORGIA.

Under the act approved December 16, 1895, it is made a misdemeanor to manufacture, sell, or offer for sale any products made in imitation

of butter or cheese, *and colored to resemble the same*, unless such products are sold as such, and the packages containing same are legibly and durably marked or branded with the word "substitute for butter," or "substitute for cheese," as the case may be. Retail dealers are required to inform their customers to whom such imitation products are sold of their true character, and in addition deliver to each said customer a printed slip stating that the same is imitation butter or imitation cheese.

Hotels, restaurants, etc., serving to guests or using in the preparation of any food imitation butter or imitation cheese must notify said guests, employees, etc., of the fact by means of a printed placard.

HAWAII.

Laws of 1897: Section 187 provides that whoever knowingly sells to any person, or offers for sale, oleomargarine or any substance purporting to be or having the semblance of butter, not made from pure cream, shall be deemed guilty of a misdemeanor and fined accordingly, unless the package containing the same is distinctly marked to indicate its contents.

IDAHO.

Act of March 9, 1903: Section 5 provides that no person shall render or manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell any substance or compound not produced directly and wholly from unadulterated milk or cream; but permits the manufacture and sale of oleomargarine in a separate and distinct form, and

in such manner as will advise the customer of its real character, *when free from coloration or ingredient which causes it to resemble butter.*

ILLINOIS.

An act approved June 14, 1897 (section 1), defines "imitation butter" as the product produced from any compound or substitute other than pure milk or cream.

Section 2 *forbids the addition of coloring matter in imitation of butter.*

Section 3 prohibits the manufacture and sale of any substance designed to be used as a substitute for butter unless the package containing the article is legibly marked "oleomargarine," "butterine," or "imitation butter."

Sections 1 and 2, act of April 24, 1901, make it unlawful to manufacture, sell, or expose for sale in the State of Illinois renovated or process butter unless the same is plainly branded "renovated butter" in a conspicuous place, to be easily read by the purchaser.

INDIANA.

Section 2181, Revised Statutes, makes it a misdemeanor to sell or expose for sale any butter other than that made from pure cream or milk without first labeling the same in large letters "oleomargarine."

Hotels, boarding houses, etc., serving oleomargarine to guests must label the product so served as "oleomargarine."

Section 1 also provides a penalty for the violation of the above provisions.

INDIAN TERRITORY.

This Territory has no legislation relative to oleomargarine, etc.

IOWA.

Section 2518 *forbids the coloring with any substance whatever* of any substance intended as a substitute for butter, *so as to cause the same to resemble butter*, or the use of any substance which will impart to the compound *the color of yellow butter*, and prohibits the sale thereof.

Section 2517 permits the manufacture of imitation butter and cheese not having a yellow color, and not artificially colored, provided each tub, firkin, box, or other package is clearly and durably branded with the words "substitute for butter," or "substitute for cheese," as the case may be. Hotels, restaurants, etc., serving imitation butter or imitation cheese, must notify their patrons of the fact by means of a printed placard.

KANSAS.

By an act approved March 2, 1889, entitled "An act to provide against the adulteration of foods or drugs," it is prohibited to manufacture or sell oleomargarine, butterine, etc,, under a false name. These mixtures must be distinctly labeled as such.

KENTUCKY.

Under the law of this State oleomargarine, butterine, or kindred compounds, or mixtures of these with butter, *can not lawfully be sold if colored in imitation of butter*. Oleomargarine is permitted to be sold if put up in separate and distinct form and in such manner as to advise the consumer of its

real character, *free from coloration or ingredients that cause it to look like butter*.

Adulterated butter is defined. Process butter which has been melted and made over is classed as adulterated. Packages of such products must be branded with the name of the contents.

(See Pure Food Laws of March 17 and June 12, 1900.)

LOUISIANA.

Act approved July 8, 1886. The laws of this State prohibit the sale, handling, or giving away of oleomargarine, butterine, etc., except when so labeled as unmistakably to indicate the true composition thereof.

MAINE.

Section 3, chapter 128 (as amended March 26, 1895) makes it unlawful for any person to sell, offer for sale, expose for sale, or have in possession with intent to sell, *any substance or compound made in imitation of yellow butter*, and not made exclusively and wholly of cream or milk, whether said article or compound be named "oleomargarine, butterine," or otherwise, and imposes a heavy penalty for a violation of any provision of the section.

MARYLAND.

Article 27, Code of Public General Laws, 1900: The manufacture of any product made from oil, fat, or oleaginous substances in the imitation of butter is prohibited. Oleomargarine may be manufactured and sold in separate and distinct form, and in such manner as will advise the purchaser and the consumer of its real character, *free from coloration or ingredients which cause it to look like*

yellow butter. In the room in which oleomar
is sold or offered for sale must be conspic
posted a placard bearing the words "oleomar
sold here."

Hotels, restaurants, boarding houses, hos
schools, and penal institutions serving oleom
rine to their guests, inmates, or help are re
to orally notify such guests, inmates, or hel
the substance so furnished is not butter, and
display at all times on each and every side
room where the product is served a legibly
durably printed sign, bearing the words "
margarine used here."

MASSACHUSETTS.

Chapter 56, Revised Public Statutes: Pe
the sale of oleomargarine in a separate and di
form and in such manner as will advise the
sumer of its real character, *free from coloratio
ingredients that cause it to look like butter.*
package containing oleomargarine or butt
must be legibly and durably branded with
words "imitation butter," "oleomargarine,
"butterine," and in each room or place w
such products are sold must be posted a pl
containing the words "sold here," preceded b
name of the imitation article offered for
Hotels, boarding houses, etc., serving imit
butter or imitation cheese must notify their pa
of the use of such products.

Renovated butter offered for sale, or sold,
be labeled in such manner as not to be easily
faced, with the words "renovated butter."
sections 37, 41, 44, 47, and 48.)

MICHIGAN.

Act No. 22 of the session laws of 1901; Section 1 prohibits the manufacture or sale of any article, product, or compound made wholly or partly out of fat, oil, or oleaginous substances which shall be in imitation of butter made from milk or cream, but permits the manufacture and sale of oleomargarine in separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredient that causes it to look like yellow butter.*

Section 2 provides a penalty for the violation of the above provisions. (The constitutionality of this law has been upheld by the supreme court of Michigan in case of *People* v. *Hatton*, decided June 24, 1902.)

MINNESOTA.

By the laws of Minnesota "imitation butter" and "process or renovated butter" must be plainly and durably branded with the true name of the contents, and dealers in such products must inform purchasers of the nature of the substance sold or offered for sale. Hotels, boarding houses, etc., serving imitation butter, or process or renovated butter, must notify patrons to that effect by means of a printed placard.

It is a misdemeanor for any person or firm to manufacture or sell or offer for sale any product made wholly or partly out of fat, oil, or oleaginous substance, or compound thereof, *which shall be made in imitation or colored to resemble yellow butter* produced from milk or cream.

(See chapter 256, General Laws of 1899; chapter 141, General Laws of 1897; act April 6, 1901; act March 27, 1886; act March 23, 1889.)

MISSISSIPPI.

Act approved March 9, 1882: Section 1 provides that every person dealing in oleomargarine, or other similar manufactured butter, before offering same for sale, must distinctly and durably mark or brand each package or parcel with the word "oleomargarine," or with whatever name it may be known, and shall offer same for sale by and according to this mark or brand. Every dealer in such articles is required to pay a privilege tax of $50.

MISSOURI.

The law of 1889 requires that the name of any substance made in imitation of butter shall be clearly and indelibly branded, marked, or labeled upon the packages containing same. Hotels or boarding houses serving oleomargarine must clearly and durably mark the vessel in which the compound is served with the words "oleomargarine" or "impure butter."

The law of 1895 defines "imitation butter" as the product made from other than pure milk or cream, made in semblance of butter, and designed to be used as a substitute for butter. The *coloration of imitation butter is prohibited, excepting that intended for export or sale outside of the State*, in which case harmless coloring matter may be added without violating the law. Vessels containing imitation butter are required to be marked with the words "substitute for butter," and to be shipped under its true name.

MONTANA.

An act approved March 4, 1901, forbids the manufacture or sale of any article or substance in semblance of butter or cheese made exclusively

from pure milk or cream, and requires that each package or other inclosure containing such products shall be plainly and durably branded with the words "oleomargarine" or "imitation cheese" to indicate the contents of the package.

Hotels, boarding houses, etc., serving to guests any oleomargarine, imitation cheese, or other similar substances, are required to post up notices to that effect.

House bill No. 80 provides that "every person, company * * * selling oleomargarine, butterine, imitation cheese, and similar substances, shall pay a license of 1 cent per pound for all these articles sold."

NEBRASKA.

Section 2, act of March 5, 1895, provides that no person shall coat, powder, or color with annato, or any other coloring matter whatever, any substance designed as a substitute for butter, whereby such substitute or product *so colored shall be made to resemble butter*, or the product of the dairy, and prohibits the sale within the State of any such colored product.

The act further provides that any article in semblance of natural butter or cheese that is not made exclusively from milk or cream shall be distinctly and durably branded, stamped, or marked so as to advise the purchaser of the contents. This law protects consumers at tables, by requiring keepers of hotels, restaurants, boarding houses, etc., to keep posted a card opposite each table, in a conspicuous place, bearing the following notice: "Imitation butter used here," or "Imitation cheese used here," if such is the case.

NEVADA.

Sections 4906 and 4907, Compiled Laws: Provide that all packages containing any article in semblance of natural butter, manufactured or offered for sale, which is not made exclusively from milk or cream, must bear the word "oleomargarine" distinctly branded or marked thereon.

NEW HAMPSHIRE.

Act approved March 22, 1901: This act prohibits the manufacture or sale of oleomargarine, adulterated butter, or imitation cheese except in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredients that cause it to look like butter* or cheese made from pure milk or cream.

Hotels, boarding houses, etc., serving to guests any imitation butter or cheese must notify their patrons to that effect.

NEW JERSEY.

An act of March 22, 1886, provides against the sale of oleomargarine or any substance in semblance of natural butter or cheese except when the tubs, pails, boxes, firkins, vessels, or other packages containing the same are marked or labeled with the words "oleomargarine," "imitation butter," or "imitation cheese."

An act supplemental to the above, approved April 21, 1887, prohibits the sale of oleomargarine, butterine, etc., *containing any coloring matter*, and requires retail dealers selling less than the original package to furnish the purchaser with a printed card or notice of the nature of the substance.

Possession by any person of oleomargarine or any substance not natural butter not contained in a box, tub, or vessel plainly marked and branded in accordance with this act shall be prima facie evidence of intent to sell the same.

NEW MEXICO.

Section 4 of the food act of February 28, 1889, makes it a misdemeanor to sell any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser.

NEW YORK.

The law of April 7, 1902, prohibits the manufacture and sale of imitation butter, whether colored or not, and whether offered for sale as oleomargarine or under any other name whatsoever.

The possession by any dealer of any article or product the manufacture or sale of which is prohibited by this act shall be deemed to have the same for sale if he exposes the same with other merchandise or stock in his place of business.

NORTH CAROLINA.

Pure food laws of February 13, 1899: Section 2 provides that any person, by himself or his agent, who shall knowingly manufacture, sell, or expose for sale, or have in his possession with intent to sell, any article of food which is adulterated or misbranded to deceive the purchaser is guilty of a misdemeanor and punishable by fine and imprisonment.

NORTH DAKOTA.

Act approved March 8, 1901: Section 7639 requires that any person who sells an article in semblance of butter made from oils or fats, and not the legitimate product of the dairy, made exclusively from milk or cream, must legibly and durably brand the product in a conspicuous place with the words "Oleomargarine," "Butterine," or "Patent butter," as the case may be.

OHIO.

Act of May 16, 1894: By the laws of this State oleomargarine may be sold in separate and distinct form, and in such manner as will advise the consumer of its contents, *free from coloration or ingredients that cause it to look like or appear to be butter*. Each package containing such product must be legibly and durably branded with the word "oleomargarine." Hotels, restaurants, etc., using oleomargarine must inform their guests of such fact by means of a printed placard.

OKLAHOMA TERRITORY.

This Territory has no legislation relative to oleomargarine, etc.

OREGON.

Pure-food law.—Act approved February 27, 1901: Section 2 makes it unlawful for any person to offer or expose for sale reworked butter or mixed butter, unless the same is plainly marked "Process butter."

Section 4 forbids the sale of oleomargarine or other substitutes unless put up in a separate and distinct form, and in such manner as will establish their true identity, *free from coloring matter or ingredients causing same to look like butter*.

PENNSYLVANIA.

An act approved May 29, 1901, provides that oleomargarine, or any similar substance not produced from pure cream or milk, *shall be made and kept free from all coloration or ingredients causing it to look like yellow butter*, and the same shall be kept and presented in such a manner as will advise the purchaser and consumer of its real character.

Hotels, boarding houses, and restaurants serving oleomargarine are required to pay a license, and must inform their guests of the nature of the article by means of printed placards.

Oleomargarine must at all times be so marked as to indicate clearly that it is such.

Act approved July 10, 1901, defines renovated butter and provides for manufacture and distinct marking of same.

A penalty is provided for violation of the provisions of any of the above acts.

PHILIPPINE ISLANDS.

Public laws and resolutions passed by the United States Philippine Commission, act 157, section 4, subsection B, page 335: The board of health for the Philippine Islands is authorized to "make inquiry and investigation into * * * employments, conditions, habits, foods, beverages, and medicines, etc." In addition to this city councils are authorized to control the establishment of slaughterhouses and markets and to "provide for and regulate the inspection of meats, fruits, poultry, milk, fish, vegetables, and all other articles of food."

PORTO RICO.

Regulation XXVII.—Standards for articles of food offered for sale in Porto Rico: Paragraph 2 provides that "no butter shall be sold, offered for sale, or transported in or into the island of Porto Rico with the purpose of selling it or offering it for sale as pure butter that contains less than 80 per cent of the fat of cow's milk, more than 16 per cent of water, or more than 7 per cent of salt, and the sale of any article under the name of butter that contains any fat other than that of the milk of cow is prohibited, but this prohibition shall not extend to such goat's butter produced in Porto Rico as may be offered for sale, provided the purchaser is previously informed of its nature."

RHODE ISLAND.

Chapter 146, Public Statutes of Rhode Island, 1896: The laws of this State require that every tub, firkin, box, etc., containing any substance in semblance of butter, and which is not made exclusively from milk or cream, shall bear the word "oleomargarine." Retailers of such substances must deliver to the purchaser a written or printed card bearing the word "oleomargarine."

SOUTH CAROLINA.

Act approved December 22, 1885, makes it a misdemeanor to fraudulently adulterate for purposes of sale any article of food.

SOUTH DAKOTA.

Food and dairy laws.—Act approved March 7, 1901: The laws of this State permit the sale of oleomargarine or filled cheese in a separate and

distinct form, and in such manner as will advise the consumer of the real character, *free from coloration or ingredients that cause same to look like cheese or yellow butter.*

A person having in his possession oleomargarine with intent to sell same is required to place a legible sign in a conspicuous part of the room where such product is sold, bearing the words "Oleomargarine sold here," and shall give to each purchaser a card containing the word "Oleomargarine" and the name and per cent of the ingredients contained therein.

TENNESSEE.

An act approved March 24, 1897, prohibits the manufacture, importation, or sale, or offering for sale, of any article of food or drink which is adulterated or misbranded.

TEXAS.

Article 427 (393), chapter 2, Penal Code Revised Statutes of 1895, provides that any person who fraudulently adulterates for purposes of sale any substance intended for sale with any substance injurious to health shall be punished by a fine not less than $50 nor more than $500.

UTAH.

Food and dairy laws in effect March 14, 1901: Section 736 permits the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, *free from coloration or ingredient that causes it to look like butter.*

Sections 738 and 739 require that packages con
taining oleomargarine, butterine, or similar sub
stances, offered for sale, shall be legibly an
durably marked to indicate the contents, and fur
ther that the room or place in which such product
are sold shall have posted in a conspicuous portio
thereof a placard bearing the words "Oleomarga
rine sold here," or "Butterine sold here."

VERMONT.

Act approved November 22, 1900: Section
defines butter and cheese as the products usuall
known by these names and manufactured exclu
sively from milk or cream, with salt and rennet
and with or without coloring matter.

Sections 1 and 2 require any products made i
imitation or semblance of butter or cheese as
substitute for butter or cheese to be sold as such
and the packages containing same to be marke
with the following words in a durable and legibl
manner: "Imitation butter," "oleomargarine,"
"butterine," or "imitation cheese," as the cas
may be.

Section 3 provides a penalty for the violation o
the above sections.

VIRGINIA.

Act approved March 6, 1900: Section 1 makes i
unlawful to manufacture or sell as, or for, butter
any article made wholly or partly of fat or oleag
inous substance or compound not produced fro
pure milk or cream, but it allows the manufactur
or sale of oleomargarine, butterine, or kindred com
pounds, in separate and distinct form, and in suc
manner as to advise the customer of its real char
acter. Said product *to be free from coloration o
ingredients that cause it to look like butter.*

Section 2 requires persons using in preparation of food, or serving butterine or oleomargarine to guests, boarders, etc., of hotels or eating houses, to post up notices in conspicuous public places, as follows: "Imitation butter used here."

WASHINGTON.

Dairy and food laws of 1899, chapter 43: Section 5 makes it a misdemeanor to manufacture or sell as or for butter any oleaginous substance or compound not produced from milk or cream.

The law allows the manufacture of sale of oleomargarine in separate and distinct form, *free from coloration or ingredients that cause it to resemble butter*, and in such manner as to apprise the customer of its real character, but requires that persons dealing in, or serving to patrons, guests, boarders, etc., of hotels or eating houses, to post up notices to that effect.

Section 30 makes it unlawful for any person, firm, or corporation to have in his possession with intent to sell, butter known as "Process butter," unless the package is branded with the words "Renovated butter."

WEST VIRGINIA.

Code of West Virginia, page 1115: The law of this State requires that it shall be unlawful for any manufacturer or vendor of oleomargarine, artificial or adulterated butter, to manufacture or offer for sale within the limits of this State such products *unless the same be colored pink*.

(This law has been held constitutional by supreme court of West Virginia. See *State* v. *Meyers*, 42 W. Va., 822.)

WISCONSIN.

An act approved April 9, 1901, m
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Section 4607–D, Statutes of 1898
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to guests oleomargarine, butterine,
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WYOMING.

Section 5109, Revised Statutes of
that any person who adulterates
article of food with fraudulent int
the same for sale or to cause or pe
to be offered for sale as unadulterated
is guilty of a misdemeanor and puni

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Supreme Court
FILED
DEC 17 1900
JAMES H. MCKENNEY
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

ADOLPH CLOTT, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 221.

FREDERICK J. SCHICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 222.

WILLIAM BRODRICK, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 223.

LEVI W. MCCLAIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 224.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AUGUST CLIFF, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 221.
FREDERICK J. SCHICK, PLAINTIFF IN error, v. THE UNITED STATES.	No. 222.
WILLIAM BROADWELL, PLAINTIFF IN error, v. THE UNITED STATES.	No. 223.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GEO. W. MCCRAY, PLAINTIFF IN ERROR, v. THE UNITED STATES.	No. 301.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION, WITH ADDITIONAL REMARKS UPON THE MERITS.

I. RESPECTING JURISDICTION.

These cases were all proceedings to recover a penalty, incurred under section 11 of the oleomargarine act.

The Cliff, Broadwell, and Schick cases were instituted by information, and a stipulation was filed, whereby a trial by jury was waived.

The McCray case was instituted by petition. The defendant filed an answer, to which the plaintiff demurred, and the demurrer was sustained by the court.

As to the nature of an information to recover a penalty—whether civil or criminal.

A penal *action* is defined to be the civil suit brought for the recovery of a statutory forfeiture when inflicted as a penalty for an offense against the public. (16 Ency. Pl. and Prac., p. 231, and cases cited.)

In *Atcheson* v. *Everett* (1 Cowp., 382) Lord Mansfield said:

> There is no distinction better known than the distinction between civil and criminal law; between criminal prosecutions and civil actions. Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguished between them. *Penal actions were never yet put under the head of criminal law or crimes.* * * * It is as much a civil action as an action for money had and received.

Informations to recover penalties and forfeitures seem to have been recognized as civil proceedings by this court, although in *Ex parte Wilson* (114 U. S., 417) the fact was noted that in recent years *prosecutions* by information have greatly increased.

In *Clifton* v. *United States* (4 How., 242), the court said that an information for a forfeiture "is in the nature of a criminal proceeding," and for that reason held that one good count was sufficient to support a verdict and judgment upon all the counts, though some were bad. In *Snyder* v. *United States* (112 U. S., 216), it was held that while informations under the revenue laws are not strictly criminal cases, but are civil actions, yet "they are so *in the nature* of criminal proceedings as to come within the rule that a general verdict, upon several counts seeking in different form one object, must be upheld if one count be good." [Citing *Clifton* v. *United States*, 4 How., 242, 250.]

A distinction is thus indicated between such informations and those for the recovery of a penalty; in the one case the proceeding being *in rem* and in the other *in personam*.

The statutes also seem to make a distinction between penalties and forfeitures on the one hand and criminal offenses on the other (secs. 1044, 1046, 1047, R. S.), and the oleomargarine law appears to notice the legal distinction between a fine and penalty (secs. 4, 6, 7, 9, 12 *et seq*); but in view of the word "offense" in section 11 of the oleomargarine act, there is ground for saying that the penalty which it provides was imposed as a fine for the violation of what is made a misdemeanor.

If an information to recover a penalty be a civil action, trial by jury in these cases could have been waived; but in the absence of an agreed statement of facts, how far are the judgments therein open to review?

In *Henderson's Distilled Spirits* (14 Wall., 33), the court said:

> Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury, and submitted the case to the court *upon an agreed statement of facts*, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.

In *Rogers* v. *United States* (141 U. S., 548) the parties filed a written stipulation waiving the right of trial by jury, and the court filed findings of fact, which stated that it had "heard the testimony of the witnesses." Upon these findings judgment was rendered for the United States. This court said:

> The circuit court could not properly consider *any of the matters raised by the bill of exceptions;* nor can this court do so. All that the circuit court could do was to affirm the judgment of the district court; and all that this court can do is to affirm the judgment of the circuit court.
>
> * * * * *
>
> *Without considering any questions on the merits*, the judgment of the circuit court is therefore affirmed.

It may be doubted, however, whether, in the *Rogers* case, the court intended to be understood as holding that no question of law presented by the record in a civil case, tried by the court without an agreed statement of facts, could be reviewed on error, even if that question appeared independently of any issue of fact decided by the court. The court did not, in the present cases, make any findings of fact, there being no dispute as to the matters of fact out of which the constitutional questions arose. In the *Rogers* case, the particular question of law presented for determination rested upon the disputed fact, found by the court, that the bond sued on was given voluntarily. Here, the constitutional questions are distinctly presented in the several motions to find the defendant not guilty, as well as in arrest of judgment, and resting as they do upon undisputed facts, would seem to be open to review, the court confessedly having jurisdiction.

Trial by jury in criminal cases—when a constitutional right.

Treating the present proceedings by information as criminal actions, it seems proper to consider, at the outset, in what cases trial by jury is a matter of constitutional right.

The authoritative decision on this question is *Callan* v. *Wilson* (127 U. S., 540). In that case,

Mr. Justice Harlan, delivering the opinion of the court, said (p. 552):

> According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily and without a jury; and in respect to other offenses, the constitutional requirement is satisfied if the right to a trial by jury in an appellate court is accorded to the accused.

The opinion proceeds to cite State authorities [among others *Byers* v. *Commonwealth*, 42 Pa.; see reference thereto in Mr. Guthrie's brief on jurisdiction, p. 10] which recognize the extensive and summary power constantly exercised in the States for the repression of breaches of the peace and petty offenses, which is not supposed to conflict with the constitutional provisions securing to the citizen a trial by jury. It is true that these cases are based upon particular State laws, and that the offenses principally in mind are those which violate various municipal regulations.

The doctrine which that case establishes is that those misdemeanors of a *serious* character which were triable by jury at common law, and which involve a deprivation of the liberty of the citizen, must, as a matter of constitutional right, be tried by jury in courts of the United States.

Assuming that section 11 of the oleomargarine act makes the act of purchasing or receiving oleo-

margarine which has not been branded or stamped as required by law a misdemeanor, it can hardly be classed, like the offense of conspiracy, involved in *Callan* v. *Wilson*, among those crimes the nature and consequences of which are so serious as to entitle a person accused thereof to trial by jury.

In *Brewster* v. *The People* (183 Ill., 143), in which it was held that, in view of the peculiar wording of the State constitution, the right of trial by jury in the case of a misdemeanor, punishable only by fine and imprisonment, could be waived, the court said:

> "No jury trial in criminal cases was ever known to the common law, but such as followed upon indictment in a common-law court, after the accused was in custody, had been arraigned, and had pleaded [not] guilty to the indictment." (*People* v. *Fisher*, 20 Barb., 656; *People ex rel.* v. *Justices*, 74 N. Y., 406; *State* v. *Conklin*, 27 Vt., 319.) As jury trials in criminal cases, as known to the common law, were such as followed upon indictment in a common-law court, and as our Constitution refers to the right of trial by jury, as it was understood at common law, then the prohibition against the right to waive a trial by jury can not apply to misdemeanors, because the Constitution expressly provides that, in cases of misdemeanors, a person may be held to answer without indictment.

It is doubtless proper to observe that the practice in the district courts of the United States has been

to try all criminal cases, whether felonies or misdemeanors, by jury. Those courts have no jurisdiction of municipal offenses, such as were referred to in *Callan* v. *Wilson* as those in which trial by jury would not be a matter of constitutional right. In that case the court was confronted with the peculiar situation which exists in the District of Columbia, where the courts of the United States exercise both a general and a municipal jurisdiction. And it is also true that there is no Federal statute expressly authorizing waiver in criminal cases like the State statutes of that kind.

It is also to be observed that Mr. Justice Story, in *United States* v. *Gibert* (2 Sumn., 19; Fed. Cas. No. 15204), was of opinion that in the case of a misdemeanor there never could be any other trial than by jury. The charge in that case was robbery on the high seas.

In the case of *Bonner* (151 U. S., 242) the view was expressed that the trial of a criminal case in a Federal court could be in no other way than by jury. The charge in that case was larceny.

As to waiver.

In *United States* v. *Taylor* (11 Fed. Rep., 470) an information had been filed in the district court for the district of Kansas, charging the defendant with the offense of carrying on the business of a retail liquor dealer without having paid the special taxes required by law. In the course of the trial the court directed the jury to return a verdict of

guilty. This was held to be error by the circuit court, which, in the course of its opinion, referring to the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed guaranteed by the sixth amendment, said:

> This is a right which can not be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous.

It seems that the contrary view as to the right of the court to direct the jury to return a verdict against the defendant had been announced by Mr. Justice Hunt in the case of *United States* v. *Anthony* (11 Blatchf., 200). But Judge McCrary, in commenting on that case, remarks that Judge Hunt seems himself to have doubted the soundness of the ruling, because upon a subsequent trial for the same offense a verdict of guilty was not ordered and the case was submitted to the jury; and it should be observed that Judge McCrary also states that he had consulted Mr. Justice Miller, who authorized him to say that the learned justice concurred in the conclusion which Judge McCrary reached.

United States v. *Shaw* (59 Fed. Rep., 110), however, distinctly asserts the right of an accused person to waive trial by jury. The court said:

> Many of the cases where the right of the accused to consent to the discharge of a juror is denied were those where the accused

was being tried for murder, and there might be capital punishment. (See *Cancemi* v. *People*, 18 N. Y., 128; *Territory* v. *Ah Wah*, 4 Mont., 149, 1 Pac., 732; *Hill* v. *People*, 16 Mich., 354.)

In the case under consideration the offense charged, of which the defendant has been convicted, is declared by the statute to be a misdemeanor; and had the juror Pendleton been discharged by the court with the consent of the defendant, we are of opinion that both reason and the weight of authority would have sustained the action of the court, and the discharge would not have been a legal ground for a new trial. (See *Tyra* v. *Com.*, 2 Metc. (Ky.), 1; *State* v. *Kaufman*, 51 Iowa, 578; *Com.* v. *Dailey*, 12 Cush., 80.)

In the *Belt case* (159 U. S., 95) it appeared that the supreme court of the District of Columbia had sustained the constitutionality of an act of Congress providing that in prosecutions in the police court of the District, in which, according to the Constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such a trial and request to be tried by the judge. This court did not, however, pass upon that question, holding that the only question presented was as to the jurisdiction of the supreme court of the District to decide the matter, which it upheld. In that case, however, the court refers to *Hallinger* v. *Davis* (146 U. S., 314, 318), in which it was said:

> Upon the question of the right of one charged with crime to waive a trial by jury and elect to be tried by the court, when there is a positive legislative enactment giving the right so to do, there are numerous decisions by State courts upholding the validity of such proceeding.

In *Hallinger* v. *Davis* it is to be observed that the court was passing upon a State law authorizing a jury trial to be waived, and upheld it although the crime was capital.

In *Thompson* v. *Utah* (170 U. S., 343) the court, speaking by Mr. Justice Harlan, said (p. 353):

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of *felony*, by consent expressly given, or by his silence, to authorize a jury of only eight persons to pass upon the questions of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

The inference from this adjudication is that in cases of felony trial by jury can not be waived; for if an accused can not consent to be tried by less than twelve jurors, he can not consent to dispense with a jury altogether.

The ruling in *Thompson* v. *Utah*, as shown by the reference therein to the *Hopt* case (110 U. S. 574), proceeds upon the theory that the accused and the only one concerned in the manner of his trial, but that society in general is interested in all proceedings that affect or destroy either the life or liberty of its members.

The language of the third article of the Constitution is imperative—"the *trial* of all crimes, except in cases of impeachment, *shall* be by jury." The *right* of trial by jury was protected in the sixth and seventh amendments. They provide respectively:

Sixth amendment.

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh amendment.

> In *suits at common law*, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

In *Bank of Columbia* v. *Okely* (4 Wheat., 235) the court, in holding that the defendant could properly be held to have waived his right to a trial by jury in that case, a civil suit, said:

> That this mode of proceeding is perfectly full effect to the seventh amendment of the Constitution is not only deducible from the general nature but from the express wording of the article referred to. That the former been that "*the trial* by jury shall be preserved" it might have been contended that they were imperative and could not be dispensed with, but the words are, that the *right* of trial by jury shall be preserved, which gleave it on the foot of a fee gre or *inheritance*, and the benefit of it may therefore be relinquished.

May not the same idea be attributable to the Sixth Amendment; and is it not therefore impossible, in dealing with a minor offense, as here, to waive the right, without contravening the general and imperative provision of the Constitution itself as to *serious crimes*?

As to the suggestion that the defect, if one exists, is matter of procedure, and does not constitute a total lack of jurisdiction, I submit whether the question of waiver here may not be held similar to that raised in the *Bessett* case, wherein the question is put in this form: "Is the judgment of the court, not being based on the verdict of a jury, a nullity, or is a trial by the court without the

waiver of a jury at most only error?" (*Maxwell* v. *Stewart*, 21 Wall., 71; 22 Wall., 77; *Humphreys* v. *District of Columbia*, 174 U. S., 195.)

The McCray case properly before the court.

Whatever the fate of the proceedings by information, the McCray case would appear to be properly before the court. That case is civil in form as well as in substance; and, having been decided upon demurrer to the answer, no question as to trial by jury is presented. The vital question in all of these cases, namely, the constitutionality of the act, may therefore in any event be determined by the court, in the light of those facts of which it can take judicial notice.

II.—ADDITIONAL REMARKS UPON THE MERITS.

The reply brief.

Judge Cooley in *Constitutional Limitations* not only says that not everything which may be done under the name of a tax is not necessarily a tax, but also that (p. 593):

> The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restriction whatever except such as rest in the discretion of the authority which exercises it.

The context shows that the abuse which he is deprecating is the levying of a tax for private benefit in reality, although ostensibly for public objects.

The learned gentlemen are mistaken in saying that I have fallen into serious error as to the law of Illinois. The law which I quoted is on the statute books of that State, and shows the intent of its legislature and how completely that body was intending to carry out the will and policy of the people. Counsel unwarrantably state that Illinois "does not prohibit, but *freely permits*" the manufacture and sale of colored oleomargarine, because in one case in a court of that State (not the supreme court), initiated by the same oleomargarine manufacturer, who is the real complainant here, the prohibitive feature of the State law was declared to be unconstitutional. And another case is cited in which the ground of decision was that the suit was a collusive one between two dealers in oleomargarine.

As to the remainder of the act, which Mr. Guthrie says is found to afford adequate protection to the public against injury, it is to be observed from his abstract "that no person shall be allowed to have in possession or under control any package of oleomargarine except for personal consumption or that of his family." If this section does not mean to strike at the deception in houses of public entertainment and does not justify the distinction which I have noted between a sale possibly open and fair and an illicit use between the sale and the consumption by which the real consumer unknowingly receives the article as butter, I am unable to see what its purpose is.

There is no change of front in the Government argument. It was never admitted by the Government that the tax is prohibitory or destructive. Nevertheless the Government's formal position, sustained by the lower court, that evidence to that effect was immaterial, was and is correct. Yet the Government now has a perfect right upon these records to argue that the tax does not amount to prohibition or destruction.

On pages 14 to 18 of the reply brief counsel appear to think that they have directed a destructive criticism against the Government figures showing that the injury to the colored oleomargarine business has not been excessive. They charge that the Government excluded uncolored oleomargarine from the total production under the old act (which is *not* the fact), and then proceed to do exactly the same sort of thing which they unwarrantably charge the Government with doing—that is, they impressively allege that there has been a falling off from 123,000,000 pounds in production to 2,700,000 pounds, or nearly 98 per cent, but studiously exclude the 68,000,000 pounds of uncolored oleomargarine which were produced during the period under review.

The whole import of the opposing argument is that oleomargarine is only oleomargarine when it competes with butter: in other words, when it is colored; that when it is uncolored, in its natural state, it is really not oleomargarine at all. Concealed in all this there is the simple demand that

the oleomargarine interests shall be left free to compete with butter.

Now observe how counsel argue both that there was and that there was not such an article as uncolored oleomargarine before the present law. At one point they manifestly contemplate the uncolored article as existing and produced under the old law. They show this contemplation more clearly when they say the one-fourth cent tax is a new levy on a *hitherto* untaxed article—"an article *theretofore* free from any tax;" and they immediately proceed to state, with the idea of showing that the tax on the uncolored article is a new tax and no tax on that article was ever imposed before, and the Government's claim of reduction of tax on the uncolored article is erroneous, that all oleomargarine, "*properly so called*," was sold as a substitute for butter, and that therefore it had to be colored as butter to meet the consumer's demands. In other words, the only possible meaning of this claim is clearly antagonistic to what has preceded, that all oleomargarine before the new act was passed was colored, and that there was then no such thing as uncolored oleomargarine. And if the latter contention is the real one, and if that was indeed the fact, then manifestly they were proceeding in defiance of State laws.

It is, of course, impossible to maintain that uncolored oleomargarine was unknown before the law of 1902 was enacted (see *post*). But either

there was or there was not uncolored oleomargarine prior to July 1, 1902. If there was, then it was taxed at 2 cents per pound, and the present tax is a reduction. If there was not, then the Government figures as to the total production are not subject to the untenable challenge which counsel make, and the present falling off in production is as the Government states and not as counsel seek to show. In any case it seems plain to me that Mr. Guthrie has entangled himself in the same dilemma which he seeks to cast around the Government (pp. 15–17, reply brief).

I remark that Mr. Guthrie's own brief in the second case of *Collins* v. *New Hampshire*, involving a later New Hampshire law, heard at October term, 1901, and affirmed by an equally divided court (187 U. S., 636, 637), speaks of colored oleomargarine and *uncolored* or *white* oleomargarine.

The words "regulatory tax" referred to by counsel were only used in the Government's brief in referring to certain remarks in the Senate debate, and were simply transferred from the language there used. The Government does not call this a *regulatory* tax, except in so far as appears in *In re Kollock*, and this word was not intended to import and does not import any illegitimate regulation of State commerce.

I am entirely unable to comprehend what counsel means when asserting that the higher rate affords no such protection against evasion, as the argument in the Senate suggested. They say,

"On the contrary, the increased gain to such offenders by reason of the higher rate would only be a so much greater incentive to offend." The force of that observation escapes me, because I can not understand how the higher rate would be an increased gain to offenders, unless it is meant that some persons would proceed to offend notwithstanding the law, and would be successful in passing off their product as butter, and thus escape even the one-fourth cent tax.

The difference between oleomargarine and butter is difficult to detect, not "because they are practically the same, contain the same ingredients, and are equally palatable, digestible, and wholesome." Counsel can not justify this statement by the insertion of the word "practically;" they do not contain the same ingredients; they do not even contain the same chemical elements, except in part, and few people, I imagine, upon an *experimentum in corpore vili*, would testify that they are *equally* palatable, digestible, and wholesome; although it may possibly be (the proposition is disputed) that oleomargarine is palatable, digestible, and wholesome. The difference is difficult to detect simply because the *physical appearance* of the two articles—butter and colored oleomargarine—is practically the same.

Counsel, pursuing the suggestion of *reductio ad absurdum*, uses another two-edged word when he characterizes a part of the Government argument as "preposterous" (p. 20). Counsel can not affect

to misunderstand what the Government brief meant when it spoke about the colored article as inevitably imitative and fraudulent in effect. The statement could not possibly be misinterpreted as referring to anything else than butter in suggesting imitation. And so counsel, after the dialectical play, concludes with a second assertion of the utter fallacy of the Government's reasonable suggestion that the high tax on the colored article would naturally tend to prevent its escaping all tax because it counterfeited the untaxed article, butter.

I presume that counsel in their conclusion on this matter (p. 21, reply brief), saying "in order to facilitate the collection of revenue on *colored* oleomargarine," do not intend to misstate the word, since they are perfectly well aware that it is the collection of revenue on *uncolored* oleomargarine which may be thus facilitated and protected.

Counsel say, in arguing that the court will not uphold this tax as seeking "to *destroy* a counterfeit or imitation of an *untaxed* article," and that the fraud practiced has been with respect to butter—that "in view of the strict supervision exercised by the Government over manufacturers it is unreasonable to suppose that the payment of taxes could be evaded because of the resemblance to butter, *or that Congress intended to strike at any such evil.*" But counsel plainly themselves suppose that Congress intended to strike at the evil; otherwise they would not have pointed out the debates to the court, which was done to inform

the court that the motive of Congress was to strike at the evil, and was unwarrantable and unjust. But here, it may be, they refer to the evil of thus evading the tax, and not the evil of imitating butter, considered by itself.

The customs decisions which counsel cite, holding that under a law which continued the precarious color standard as to the quality of sugar the later and more accurate and scientific polariscopic test could not be required by Treasury regulations, are not applicable. Here there is no such defective legislation of Congress, and the law does not permit such an evasion of this act, because if there is any artificial coloration, oleomargarine being naturally white, though not pure white, the determination of the question is legally conferred upon the Commissioner. Here the law expressly says that if the goods are manufactured in a certain way, the burden of the high duty rests upon them. There is no ambiguity which calls into effect a Department regulation of doubtful validity, but the law itself makes the regulation. The Commissioner is not altering or enlarging the law by a regulation, but he simply decides the question of coloration under an explicit authority conferred by the law.

The facts and figures again.

It was argued that the Government having, by the reference to the remarks of certain Senators made during the debates on the amendment (Government brief, p. 63), opened the door to a general

reference to the debates, the plaintiffs in error are entitled to make general reference thereto in order to show the intention of Congress in imposing this tax.

But the remarks of the Senators to which attention was directed by counsel for the Government were made in support of the proposition that Congress had the legal right to impose the tax; and in suggesting this argument in the brief I did not show the motives or mere opinions of the legislators. Mr. Guthrie's own reading from the debates shows the strength of the legal argument made by a distinguished Senator and lawyer for sustaining the higher tax on the colored article to prevent the easy evasion of the tax on the uncolored article, by reason of the resemblance to the untaxed article—butter—that is, to prevent evading the payment of any tax at all.

The difficulty with counsel for plaintiffs in error in arguing (brief in reply, p. 16) that the ¼-cent tax was not a reduction, but a new tax on a theretofore untaxed article is that they frequently collide with their own arguments as I have already endeavored to show. Thus, on page 14 of their principal brief, as showing the history of the manufacture of oleomargarine, they refer the court to the Ency. Brit., vol. 17, p. 760; Cent. Dic. and Cyc., vol. 5, p. 4101. They might also have cited Ency. Brit., vol. 4, p. 592; Cent. Dic. and Cyc., vol. 1, p. 738; and Stand. Dic., vol. 2, p. 1225.

These books of reference cited by opposing counsel show that originally there was a wide distinction between oleomargarine as it was then known and what they now claim it *to have been*. Originally oleomargarine was made from the leaf or caul fat of cattle, and "imitation butter" or "butterine" (now included under the term "oleomargarine") was made by churning *with oleomargarine*, milk, cream, or butter, so as to make an imitation butter; or, as it was then commercially known, "imitation butter" or "butterine." These distinctions apparently existed at the time of the passage of the oleomargarine act in 1886, for each is specifically named in the second section thereof. That section provides, "That for the purposes of this act," "all substances heretofore known as oleomargarine, * * * butterine, lardine, suine," etc., "shall be known and designated as oleomargarine." From this it seems clear that the substance *which is now claimed to have been oleomargarine* was, at the time of the passage of the act of 1886, *commercially known* as "butterine" or "imitation butter." Even now there is a distinction between the legal and the commercial meaning, for Dadie says (Cliff Rec. pp. 18, 19) that while legally it is called "oleomargarine," "in trade it is known as butterine."

So when counsel assert that prior to the passage of the amendment of May, 1902, there was no substance embraced within the term "oleomargarine" as defined in the original act, free from artificial

coloration, they squarely contradict the historical facts to which they have called attention. So far is it from the truth that the uncolored article was not being manufactured and would have been exempt from tax had it been manufactured, that it was the *one* substance known at the time of the passage of the act as *oleomargarine*, and formed the basis of all other similar substances used as a substitute for butter, and which were afterwards, by the express language of the act, designated, for the purposes of taxation, as oleomargarine.

It was urged that the act was not a revenue act, because the revenue produced under its operation was but trifling. In answer to this claim we call attention to the report of the Commissioner of Internal Revenue for the year ending June 30, 1903. Upon pages 158 and 159 of the report is this information:

Taxes collected on colored oleomargarine, at the rate of 10 cents per pound	$272,044.48
Taxes collected on uncolored oleomargarine, at the rate of one-fourth cent per pound	171,227.48
License taxes:	
Manufacturers	19,966.00
Retail dealers in colored oleomargarine	73,638.25
Retail dealers in uncolored oleomargarine	107,159.36
Wholesale dealers in colored oleomargarine	30,538.16
Wholesale dealers in uncolored oleomargarine	58,988.72
Total revenue	736,783.31

The table also shows that there were imported during the year nearly 22,000 pounds of oleomarga-

rine, upon which a tax of 15 cents per pound was paid.

Upon pages 154 and 155 of the report the total production for the year is shown to be:

Uncolored oleomargarine	pounds	67,573,689
Colored oleomargarine	do	5,712,257
Total		73,285,946

Of the colored oleomargarine produced, the tax of 10 cents per pound was paid upon 2,312,493 pounds, the remainder being exported free of tax.

It was further claimed that the production of oleomargarine for the months of July, August, and September of the present year shows a falling off in production from the corresponding months of the previous year, thus indicating a gradual destruction of the industry. To show that this is not the fact, but that the production of oleomargarine is always less during the summer than during the winter months, we print below a letter from the Commissioner of Internal Revenue, in which is set out the monthly production of both colored and uncolored oleomargarine from the time the present law took effect to October 1 of the present year:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE.
Washington, December 7, 1903.

Hon. H. M. HOYT,
Solicitor-General.

SIR: In compliance with your request of the 5th instant, I have the honor to state that the production of oleomargarine

taxed at the rate of 10 cents per pound and at the rate of one-fourth cent per pound, from July 1, 1902, the time the present law took effect, to November 1, 1903, is as follows:

Month.	Production, 10 cent tax.	Production, one-fourth cent tax.
1902.		
July	283,825	4,645,204
August	261,077	3,139,914
September	432,253	4,375,149
October	507,844	6,365,767
November	509,815	6,613,311
December	746,968	8,854,808
1903.		
January	603,834	7,346,436
February	556,606	6,356,339
March	598,163	6,355,464
April	541,628	6,362,625
May	356,650	3,742,080
June	311,744	3,416,592
July	284,828	3,268,805
August	285,261	3,502,618
September	281,053	4,268,993
October	322,077	4,987,703

Respectfully,

ROBT. WILLIAMS, JR.,
Acting Commissioner.

During the argument the question was asked from the bench whether an internal-revenue tax was now imposed upon other articles than tobacco and liquors. The list of articles is as follows:

OPIUM. Section 36 of the tariff act of October 1, 1890 (26 Stat., 567), imposed an internal-revenue tax of $10 per pound upon all opium manufactured in the United States for smoking purposes, and provided that no person other than a citizen of the

United States could engage in its manufacture. That act also imposed an import duty of $12 per pound upon all opium imported for smoking purposes.

Under the tariff act of July 24, 1897 (30 Stat., 153), the duty on opium imported for smoking purposes was reduced to $6 per pound. As a result, no opium for smoking purposes is manufactured in the United States.

FILLED CHEESE.—The act of June 6, 1896 (29 Stat., 253), after imposing special taxes on manufacturers and dealers in filled cheese, and after defining what should constitute filled cheese, imposed a tax of one cent per pound thereon. This act is now in force.

MIXED FLOUR.—Sections 35 to 47 of the war-revenue act of June 13, 1898 (30 Stat., 467), after defining "mixed flour," and after imposing special taxes on persons making, packing, and repacking the same, imposed a tax thereon of 4 cents per barrel; and, when such flour is imported, in addition to the import duties, the same internal-revenue tax shall be paid thereon.

This act is now in force.

PLAYING CARDS.—By the act of August 28, 1894 (28 Stat., 509), a stamp tax of 2 cents was imposed upon each pack of playing cards. This law is now in force.

The act of May 9, 1902 (32 Stat., 193), being the act amending the oleomargarine law, after defining "adulterated butter" and "process" or

"renovated butter," and after imposing special taxes upon the manufacturers and dealers therein, imposes a stamp tax of 10 cents per pound upon "adulterated" butter and a tax of one-fourth cent per pound upon "renovated" or "process" butter. This act is now in force.

I believe these are the only articles upon which an internal-revenue tax is at present laid. It is to be assumed that Congress, in selecting these subjects for taxation, has kept in view the general welfare of the people. It is also to be noted that Congress in imposing these taxes has laid them upon articles which are the objects of luxury or indulgences, or by means of which it is likely that fraud and deception will be practiced.

Where is the dividing line at which a law taxing oleomargarine loses its character as a revenue measure and becomes a regulation? Is it the point at which it is no longer possible to sell it in the market at butter prices and reap a good profit? If this be the true test, then the rate of tax which may be imposed will shift from time to time with the price of butter, a certain rate of tax being constitutional one day and unconstitutional the next. Oleomargarine, under its disguise, while also competing with the butter produced on the farm, competes especially with creamery butter. To compete with the butter from the farm it is packed in tubs as the farm butter generally is packed; in competing with creamery butter it is generally packed in prints and rolls

as that article generally is packed. Now it has occurred (and may occur again) that during the summer months farm butter has retailed in the market at from 10 to 12 cents per pound. Suppose that in order to secure a sufficient market for their product it would be necessary for the oleomargarine manufacturers to compete with farm butter at these prices, and they should insist that this could not be done if, say, the old rate of tax, 2 cents per pound, were exacted. Might they not insist, therefore, with equal force, that a tax of 2 cents per pound was unconstitutional because it made it impossible for them to sell their products at butter prices? If this law is to be declared invalid because the tax, in the opinion of the court, is excessive, at what rate may Congress constitutionally fix the tax?

The special brief for Cliff.

It is asserted in the brief filed by Mr. Harlan (p. 8) that to be oleomargarine within the terms of the act a given compound must have three characteristics: (*a*) It must be composed of some of the substances named in section 2 of the act; (*b*) it must be "made in imitation or semblance of butter;" and (*c*) when "made in imitation or semblance of butter," it must be "calculated or intended to be sold as butter or for butter." All three of these characteristics, it is said, must coexist in any compound before it can be said to be oleomargarine.

This proposition is untenable. To reach that conclusion counsel must read into the act something that is not there; or, he must give to the disjunctive conjunction "OR" the same meaning as the conjunction "AND." The language of section 2 is:

> "That for the purposes of this act," * * * "all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine," etc., * * * "made in imitation or semblance of butter, OR when so made, calculated, or intended to be sold as butter or for butter," "shall be known and designated as oleomargarine."

If the act had read, "made in imitation or semblance of butter, AND, when so made, calculated or intended to be sold as butter or for butter," then there would be some force in the claim. It is apparent that in using the word "OR," Congress intended that any of the named substances "made in imitation or semblance of butter" should be liable to the tax irrespective of whether it was made or sold or intended to be sold as oleomargarine or as butter. In other words, the sale, or the intent to sell, the compound "as butter or for butter," is not necessary to subject the compound "made in imitation or semblance of butter" to the payment of the tax.

The word "OR" is a disjunctive conjunction coordinating two or more words or clauses, each one of which in turn is regarded as excluding consideration of the other or others (Century Dictionary).

The position taken here by counsel for the Government is in full accord with the opinion of Attorney-General Garland of October 18, 1886 (18 Opin., 489), and the opinion of the Commissioner of Internal Revenue of January 12, 1903. The opinion of Judge Grosscup (125 F. R., 331) is in line with these rulings.

If it be true, as contended for by opposing counsel, that in order to subject oleomargarine to the payment of the tax it must have been made in imitation or semblance of butter, **AND** made with the intention to sell as butter, then it was idle for Congress ever to have passed the law; for no manufacturer of oleomargarine would admit that he made the article in imitation or semblance of butter for the purpose or with the intention of selling it "as butter or for butter." The burden would, in all cases, be on the Government to prove that intent before it could subject a single ounce of oleomargarine to the payment of the tax. It would be a futile and meaningless tax law.

As to the second proposition advanced by Mr. Harlan, it is sufficient to say that butter, as is well known, varies in color from the winter color (white with the faintest tinge of yellow) to June yellow. Any product, therefore, in imitation or semblance of butter of any shade of yellow, ranging from the winter to the June color, or more highly colored, is subject to the tax. As we have pointed out, the original oleomargarine was made out of the leaf or caul fat of cattle, which gave it a

somewhat resemblance in color and consistency to that of winter butter.

Mr. Harlan's next proposition is, in effect, that since vegetable oil is a statutory ingredient of oleomargarine, the use of any vegetable oil in the manufacture of oleomargarine, no matter how small in quantity or how great a coloration it imparts to the product, and no matter how deleterious to the wholesomeness of the product, does not constitute an artificial coloration within the meaning of the statute. The language of the statute is:

> All mixtures and compounds of tallow, beef fat, suet, lard, lard oil, VEGETABLE-OIL ANNOTTO, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter.

The court will observe that the words "vegetable" and "oil" are connected by a hyphen and that there is no comma between the word "oil" and the word "annotto;" and then follow the words "and other coloring matter."

It seems then that Congress, in using the term "vegetable-oil annotto," did not intend to class that product with the fatty substances, but with the coloring elements. The language means that "annotto" when produced from the arnotto tree (Century Dictionary) may be used as a coloring, but *not* when manufactured from coal-tar products. Originally annotto was produced wholly from the fruit of the arnotto tree; it is now also derived from coal-tar products.

The Government does not contend that the effect of the statute is to prohibit the use of substances other than those named, or that vegetable oils may not properly be used in the manufacture of oleomargarine. Some vegetable oils are, in fact, used. Whether they were being used in 1886, at the time of the passage of the original act, counsel is not now advised. But the Government does not concede that *all* vegetable oils may be used. What the Government claims is, that vegetable oils must be of such character as to be naturally adapted for use as food in the form in which used; they must be wholesome and palatable irrespective of the quantity used; otherwise they can not be said to be a *natural* ingredient.

Obviously there are many vegetable oils which are not fit for this use, and when unpalatable or unwholesome the manufacturers certainly would avoid them as ingredients, in large or small quantities, because they would injure the sale of the product. Similarly the commercial motive would prevent them from using an ingredient which is too costly, or unavailable for any other reason, like limited amount of supply. So, when they use a vegetable oil ingredient which is unpalatable or unwholesome, or partially deleterious, in such small quantities as to be negligible in its substantive effect, and the article gives a color, then not only is the intention clear, but the artificiality and the consequent violation of

the law are equally clear. That the article is a *natural* substance in general, produced by or from nature, instead of compounded by art, does not make it any the less artificial *quoad* the coloring of oleomargarine. It is probable that well-known artificial colors are "natural" in the same sense, and are harmless. I have always understood that they are made from carrots and other vegetable materials. This is what "vegetable-oil annotto" means. It is only the conjunction of the right color, for the forbidden use, in small quantities, with the vegetable oil origin, which leads the manufacturer to use palm oil, and permits Mr. Harlan to make his ingenious but untenable argument.

I have no doubt that many experiments have been made and are in progress to find an oil which may be used as a fit and natural food ingredient and which, when so used, will impart the desired color. It is obvious that many factors condition the problem—cost, supply, substantive effect upon the product, color, and the right *degree* as well as "*primary*" *relations* thereof (*i. e.*, between red, orange, yellow), because unless the color is concentrated the oil proportion would overbalance the solid elements and the necessary hard consistency would not be attained. A mere *yellow* oil like peanut oil, otherwise desirable, would not do.

So that the manufacturers in seeking to meet the law, or rather to evade it, take this highly colored and unfit vegetable oil, with an excess of

deleterious acids even when refined, and, finding in accordance with the laws of color that a dilution of red and orange produces yellow, and that this substance used in small quantities in oleomargarine yields that color, and does no injury (as it is claimed), because the deleteriousness is minute, assert that they are using a proper ingredient and that the color thereby imparted is not artificial. It is impossible to sustain this argument upon any reasonable view of the facts or any proper conception of legal logic.

It will be recalled that pink, in the New Hampshire case, was called a *discoloration*. Is not yellow also a discoloration of *oleomargarine?* Suppose a proper oil ingredient naturally gave a pink tinge, would that color, then, be discoloration?

Let us examine the question of the nature of palm oil, as shown by the evidence and by science. Is it really a *natural* ingredient of oleomargarine as claimed by opposing counsel? On page 97 of the brief for the Government the character of the oil is pointed out, the statement being based upon the finding of the Commissioner, the statements found in the works of the two chemists there mentioned and the testimony of the chemist Hoskins. Counsel asserts that this claim that palm oil is deleterious to health (brief, p. 12) is unfounded unless the *ex parte* statement of the Commissioner of Internal Revenue be regarded as evidence. The finding of that officer is in evidence (Cliff record, p. 9) and it is the finding

of an officer upon an official investigation while acting within the scope of his authority (section 14). This finding was made after investigation, with the aid of expert chemists provided by law, of the samples of palm oil submitted by Moxley, the manufacturer of the oleomargarine involved in this case; and we submit that that finding, under the law, is conclusive.

It is said the Government has overlooked the testimony of Professor de la Fontaine (Cliff record, p. 12). This witness states that palm oil "is quite as digestible as any other of the fats that we use for food," and that after being *refined* there would be no objection in using it in large proportions; but he understands the process of refining does away with most of the flavor and color, and that ultimately (not at present) refined palm oil will find its way on the market as a regular article of food; perhaps not in this country where we have lard in plenty and other fats, *but in other countries.* This is as much as to say that at present it has not found its way on the market as a *natural* ingredient of oleomargarine, but that in the future it may do so in countries where other fats are more expensive. I suppose he refers to east Africa, but we are not concerned with tastes and notions of hygiene there.

But the chemist Hoskins (Cliff record, pp. 10, 11) is not so sure about the wholesomeness and future use of palm oil. His statement is, that in his opinion "there is nothing deleterious or un-

wholesome in the use of palm oil in the proportion in which it was used in this formula"—that is, less than 1 per cent. That limitation implies that if used in a larger quantity it would be deleterious and unwholesome.

Referring to the works of the chemists, to which we have called attention, we find the following respecting palm oil (Lewkowitsch's "Chemical Anal. of Oils," 2d ed., p. 517):

> Palm oil is characterized by the *very* large amount of free fatty acids it contains. Even in the fresh state the proportion of fatty acids calculated as palmitic acid amounts to 12 per cent, and may, in older samples, reach as much as 100 per cent; in other words, the splitting up of the glycerides may become complete [that is, become acids]. I have found in a large number of commercial palm oils from 50 to 70 per cent of free palmitic acid. * * *
>
> The coloring matter of palm oil is bleached by exposure to air, or by heat, or by chemicals, such as chromic acid, etc. The two latter processes are adopted in practice for preparing bleached palm oil, which is almost colorless. By "chemical" bleaching the odor is destroyed, but it is not affected by heating to a high temperature. The coloring principle and the odor are not destroyed by saponification with alkalis or lime (candle manufacture); acid saponification, however (p. 746), destroys both.

See also Allen's "Chemical Organic Analysis," vol. 2, part 1 (3d ed.), page 161.

Apparently palm oil is more available as a material for soap and candles than for food.

From this it will be seen that the only proper way to refine the oil and render it wholesome is by chemical process. This destroys the odor *and the color* (the "desired" property) and perhaps takes away the offensive taste.

Evidently, then, the palm oil used in the oleomargarine involved in the Cliff case had not been refined in this proper sense, else it would not have imparted the color.

It seems useless to pursue the argument further. It is clear from the evidence and from the chemical authorities cited that palm oil in the condition in which it was introduced into this oleomargarine can not be regarded as a food product or as a natural or statutory ingredient of oleomargarine; and that, until chemically refined, at least, is unfit for human consumption. Having used only a sufficient quantity to give the product the "desired" color, the conclusion is irresistible that it was used solely for purposes of coloration and did not form, and was not intended to form, any part of the fatty ingredients; and that, therefore, such use constituted an artificial coloration within the meaning of the statute.

Mr. Harlan invokes the same authorities under the customs law which are quoted in Mr. Guthrie's

reply brief. If Mr. Harlan's argument were sound that on the test of the law itself palm oil is not an artificial coloration and therefore the Commissioner under his statutory authority can not decide contrary to the clear effect of the law, nor add anything to its terms, then his conclusion drawn from these decisions, that by a department regulation (or by executive decision) a law can not be contravened or enlarged, would be sound. But I submit that his conclusion falls with his premise, and that my comment (*ante*), on the decisions which are cited, embodies the true principle of this case, namely, that there is no defect or omission in the law which the taxpayer can legally take advantage of, and that the Commissioner is merely effectuating its plain terms and meaning and is not attempting through his finality of decision either to set the law aside, or to add to its scope, or to supply its omissions. He is doing nothing more than ascertaining facts under the law, and applying the law to the facts found.

Final suggestions.

Counsel, in reply to the suggestion from the bench that his argument against the constitutionality of any legislation which would destroy or greatly injure and embarrass a legitimate industry involves the necessity of contending that State legislation prohibiting or regulating the manufacture and sale of oleomargarine is unconstitutional, although this court determined otherwise

in the *Capital City Dairy* case, nevertheless maintained that proposition; and in seeking to illustrate it, and to enforce it, further claimed that even under the unlimited power over interstate commerce Congress could not prohibit an article from entering commerce and in that way injure or destroy its value or the business producing it. Is that proposition sound? And is it possible to maintain it in view of the decisions of the court? Of course there is a great difference between legitimate and illegitimate commerce, or between a legitimate and an illegitimate article of commerce. But the court has rendered no decision which would hamper the discretion of Congress in determining whether *any* particular article, whatever its character, should be excluded from commerce. At least it is certain that Mr. Guthrie's argument on this point necessitates the view that State legislation *prohibiting* the manufacture and sale of oleomargarine is unconstitutional.

The correlation between Federal and State powers which I endeavored to point out is this: The decisions of the court show that the Federal power must not encroach upon the State domain, nor the State power upon the Federal domain; that the State power of internal police must be left untrammeled by the one authority as well as the Federal power over interstate commerce, for instance, by the other; that the plain prohibitions respectively restraining either authority can not be evaded covertly or indirectly—such an *effect* of a

law is forbidden, whatever its guise; but that, along the line where the two powers approach each other, where under the particular facts the demarcation is not definite and clear, a *bona fide* exercise of power in either domain is not invalid because its consequences incidentally affect the other domain.

So in the *Plumley case*, for example, where, as in other State cases, the oleomargarine interests were urging the reverse of their proposition in this case and contending that the State law was a regulation of Federal commerce, the court approved the statement in *Sherlock* v. *Alling* (93 U. S., 99, 103), that legislation may affect commerce in many ways without constituting a regulation of it within the meaning of the Constitution, when the legislation is not directed against commerce and only indirectly and remotely affects it.

I suppose that principle applies to Federal legislation in its bearings upon *intra* State affairs and commerce as well as to State legislation in its effect upon *inter* State commerce.

In *Louisville and Nashville R. R.* v. *Kentucky* (161 U. S., 677) it was held that the State prohibition of certain railway consolidations was within the State police power. It was said that Congress would not have the power to authorize such consolidations in defiance of State legislation. Is there not a difference between such an authority or some prohibition similarly encroaching on State power, and a legitimate Federal law asserting a

Federal attribute or object, like a Federal tax command? The opinion in that case fully sustained the State police power when "invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests." How do the present cases interfere with that principle? Is it true because State laws have been sustained as *not* constituting restraint or interference *quoad Federal* power, or because Federal statutes may unlawfully run into the State preserve, that *this* Federal *tax* law, actually following and aiding indirectly the universal policy and laws of the States, must be stricken down?

The actual situation must be recognized. In the case of a State law not antagonized but aided by the effect of a Federal tax law, or in the case of non-action by a State, can it be successfully urged that a dormant State power, possible to exert in opposition to the general tendency of legislation throughout the country and to the indirect effect of the Federal tax law, although not actually so exerted, can control a power of the Government created by the Constitution? In the present case the State police power is not dormant except in the sense that the States might reverse their existing oleomargarine policy. The State power is not dormant; it has acted; but could a dormant and potential local authority thus absolutely control the Federal power of taxation?

The *Knight* case held (156 U. S., 1) that a monopoly of *production* did not restrain interstate *commerce*. That was because production is a matter wholly reserved to State control, and for that reason the indirect effect upon commerce among the States could be ignored. I presume if the interstate-commerce power, also exclusive, indirectly affected production, its legitimate exercise would be valid none the less, and for the same reason. It was held to be valid where it thus affected the right of contract,—also a matter of State control, in the Trans-Missouri and Joint Traffic cases. (166 U. S., 290; 171 U. S., 505.)

In other words, the argument is correlative—a rightful power legitimately exercised, either in the national or State field, is not invalidated because it may somewhat affect another subject falling under the opposite authority.

Here both sovereignties have the particular power—that is, of taxation—and one, the State, has the peculiar and exclusive authority of internal police regulation. Is the Federal tax law invalidated because of an indirect effect upon the industry within the State, especially when the law falls in with the State regulation? The case is sharply contrasted with the situation as to liquor, where the Federal tax law does not recognize local prohibitions, but permits and authorizes the sale and issue of Federal licenses in States which have forbidden the traffic entirely.

In fine, there is nothing in the case but the assertion that the *amount* of the tax invalidates it. In connection with that claim I desire to recall to the court the terms of the grant of power, explicitly and exclusively (among all the grants) recognizing the object of general welfare, which therefore enforces the taxing grant in a peculiar sense. If this amount is too great to be constitutional, where and how shall the line be drawn?

One may readily quote from the great announcements of the court, or from the utterances of distinguished public men weighty truths regarding the objects of governments, the exercise of their powers, and the principles of constitutions. The doctrines for which the Government stands in this case are as solemn, as sound, and as completely established as any principles which this court has settled in construing the Constitution.

And so it is appropriate to recall to the court, as a comment upon Mr. Guthrie's argument and the grave words of his conclusion, the impressive language of Chief Justice Marshall at the close of the remarkable opinion which he delivered in *Gibbons* v. *Ogden:*

> Powerful and ingenious minds, taking as postulates that the powers expressly granted to the Government of the Union are to be contracted by construction to the narrowest possible compass, * * * may, by a course of well-digested but refined and metaphysical reasoning, founded on these premises,

> explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind could pursue its own course, none would be perceived.

I respectfully submit that, regarding the constitutional question at least, and in the *McCray* case, if not in the Chicago cases, there is no objection on the score of jurisdiction; and that the judgments below should be affirmed.

HENRY M. HOYT,
Solicitor-General.

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